EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mogane

Respondent: Bradford Teaching Hospitals NHS Foundation Trust

Heard: via Cloud Video Platform in the Midlands East Region

On: 17 May 2023

Before: Employment Judge Ayre (sitting alone)

Representatives:

Claimant: Mr. A Ohringer, counsel
Respondent: Mr. J Boyd, counsel

RESERVED JUDGMENT FOLLOWING REMEDY HEARING

1. Karen Regan is removed as a respondent from these proceedings.

2. The respondent is ordered to pay a compensatory award of £11,754.05 to the claimant.

REASONS

Background

1. The claimant was employed by the respondent from 25 July 2016 until 10 April 2020 when she was dismissed by reason of redundancy.

2. On 27 May 2020 the claimant presented a claim form including complaints of unfair dismissal, race discrimination, whistleblowing detriment, harassment, victimisation, for a redundancy payment, notice pay and arrears of pay.

3. The final hearing in the case took place on 18, 19, 20, 21 and 25 January 2021. The Tribunal found at that hearing that the claimant was dismissed by reason of redundancy and the respondent was ordered to pay a contractual redundancy payment of £19,045.88 to the claimant. The claimant's remaining claims were dismissed.

4. The claimant appealed against the decision of the Employment Tribunal. The Employment Appeal Tribunal substituted a finding of unfair dismissal and remitted the case to a different Tribunal to consider the question of remedy.

5. A Preliminary Hearing took place on 12 December 2022 at which the issues for consideration at the remedy hearing were identified.

The Proceedings

6. There was an agreed bundle of documents running to 282 pages. I heard evidence from the claimant and, on behalf of the respondent, from Dinesh Saralaya, Consultant Respiratory Physician. Both counsel submitted skeleton arguments, for which I am grateful.

7. The claimant submitted a Schedule of Loss in which she claimed losses of £57,871.85, subject to the statutory cap of £39,251.17. The respondent submitted a Counter-Schedule stating that the claimant was not entitled to any compensatory award.

The issues

8. The claimant is not seeking reinstatement or re-engagement. The parties agreed that no basic award is payable as the claimant has already received a redundancy payment.

9. The issues that fell to be decided today were set out in a List of Issues that had been agreed by the claimant's then legal representative and the respondent's legal representative prior to the Preliminary Hearing on 12 December 2022. Those issues were as follows:

    a. What amount should be awarded to the claimant by way of a compensatory award for unfair dismissal? This includes consideration of the following questions:

        i. What financial losses has the dismissal caused the claimant?

        ii. What amount should be awarded for loss of statutory rights?

        iii. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

iv. If not, for what period of loss should the claimant be compensated?

v. What would have happened to the claimant's employment had the respondent acted fairly in light of the need to dismiss one nurse by reason of redundancy?

vi. If there was a chance that the claimant would nonetheless have ben dismissed, should her compensation be reduced? By how much?

vii. Should credit be given for the redundancy or termination payment which the claimant received? If so, show much?

viii. What is the statutory cap of fifty-two weeks' pay which applies to this award?

10. Since the Preliminary Hearing, the parties have agreed a number of issues including:

a. The amount to be awarded for loss of statutory rights: £500;
b. The financial losses incurred by the claimant between 10 April 2020 and 31 December 2021 (the claimant is not seeking to claim for any financial loss beyond that date): £57,871.85; and
c. The amount of the statutory cap on the award: £39,251.17.

11. In addition, Mr. Boyd indicated during the course of the hearing that the claimant has failed to mitigate her losses by not taking reasonable steps to find another job.

12. As a result, the only issues that I have to determine are those set out at sub-paragraphs 9v, 9vi and 9vii above.

Findings of Fact

13. The claimant is a qualified nurse who worked for the respondent as a Respiratory Research Nurse on a series of fixed term contracts from 25 July 2016 until 10 April 2020 when her employment terminated by reason of redundancy. Whilst employed by the respondent she worked 37.5 hours a week in a band 6 role and her gross annual salary was £32,525.

14. On 30 May 2019 the claimant was signed off by her GP as unfit to work due to ill health. She remained absent from work due to ill health until her employment terminated in April 2020. Following her dismissal, the claimant remained unwell and was, as a result, unable to work or look for alternative work.

15. After her employment was terminated the claimant did not work until 1 January 2022 when she began working for her husband's business. The business was set up in 2020 and provides software solutions for the healthcare industry.

16. The claimant has decided not to return to nursing. She is not paid for the work that she carries out for her husband's business and has not earned any salary since leaving the respondent's employment.

17. In preparation for today's hearing, the respondent produced a redundancy selection matrix and scored the claimant and Lucy Brear against that matrix. The matrix was not used at the time of the claimant's dismissal. It has not been used on any other occasion in the department and did not form part of the respondent's redundancy policy.

18. The claimant and Lucy Brear are both band 6 nurses and the annual cost of employing each of them (including employer's national insurance contributions, pension and apprenticeship levy) is £37,946.21.

19. The selection matrix produced by the respondent included seven criteria:

    a. Experience & Qualifications. Both the claimant and Lucy Brear were given a maximum score of 4 out of 4 for that criterion. This was despite the fact that the claimant had worked as a research nurse for longer than Lucy Brear and appeared to have a higher level of qualification.

    b. Performance. The maximum score for this criterion was 7, and both the claimant and Lucy Brear were scored 7.

    c. Electronic Patient Record ("**EPR**"). The maximum score for this criterion was 3. The claimant was awarded a score of 1 and Lucy Brear a 3.

    d. Staff management. The claimant was awarded a score of 0 for this criterion, and Lucy Brear got the maximum, a 3.

    e. Attendance. Both the claimant and Lucy Brear got a maximum score of 0 for this criterion.

    f. Disciplinary / capability. The maximum score was 0 and both were awarded the maximum.

20. The claimant scored a total of 12 points under the selection matrix, and Lucy Brear scored 17. The only differences in score were in EPR and staff management, where Lucy Brear scored higher.

21. Mr. Saralaya gave evidence that Lucy Brear scored higher for EPR because she had taken it upon herself to create a series of templates for the department to use which enabled them to capture the necessary information to input into EPR. He also said that she trained the rest of the team on the use of the templates and worked in her own time on the templates.

22. In relation to staff management, Mr. Saralaya said that Lucy Brear had expressed an interest in developing management responsibilities and was trained in using the respondent's E-roster system, so that she could help with staff rostering an approval of leave. He also said that she covered for the manager when she was away and supervised other members of the team including the claimant.

23. The claimant's evidence, which I accept, was that the matrix is not contemplated by the respondent's redundancy policy and has been manufactured for the hearing. The claimant also gave evidence that the criteria chosen deliberately benefitted Lucy Brear, and that the scores were engineered to downgrade the claimant.

24. The claimant said that she should have scored more highly than Lucy Brear for experience and qualifications, performance and management, and that EPR was not an appropriate criterion to use. Based upon her evidence I accept that she had been working as a nurse for longer than Lucy Brear and had previously been involved as a senior nurse on another ward.

25. The criteria used in the scoring matrix were different to the Knowledge, Skills and Experienced listed in the job description for a Respiratory Research Nurse as being either essential or desirable. There was no mention, for example, of patient care, which is a key part of the role.

26. On balance I do not accept Mr. Saralaya's evidence in relation to the scoring matrix. He acknowledged in cross-examination that the matrix had not been used on any other occasion in the unit. His answers on the production of the matrix were vague. For example, he could not say whether it had been produced specifically for this hearing or when it had been produced. He did not know whether any band 6 nurses had been consulted about the matrix.

27. It was clear from Mr. Saralaya's evidence that he has a degree of animosity towards the claimant. He did not appear to have a good word to say about her. He appeared dismissive of the claimant's skills and experience. For example, he said that the claimant's greater experience as a nurse had no bearing, and that the claimant's previous experience as a respiratory nurse was of no relevance. He commented during evidence that he did not think the claimant was capable of staff management, but without saying why. He provided no clear examples to back up his views about the claimant.

28. In contrast, Mr. Saralaya spoke about Lucy Brear in glowing terms, and had only positive comments to make about her. His scoring of the claimant and Lucy Brear appeared to be based upon his subjective opinions rather than any objective evidence. It also appeared that Lucy Brear had been scored on the basis of her performance after the claimant had left the respondent's employment, as she remained working in the department until July 2021.

29. The respondent has paid to the claimant an enhanced redundancy payment. Once the statutory redundancy payment has been deducted from the enhanced payment, the balance is £17,431.88.

30. During the period that the claimant was not working, between April 2020 and the end of December 2021, her net loss of wages and pension contributions came to a total of £57,371.85.

The Law

31. Section 123 of the Employment Rights Act 1996 ("**the ERA**") contains the power to make a compensatory award where an employee has been unfairly dismissed and provides as follows:

"(1) *…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…*

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of –
(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment.

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal."

32. Section 123(7) of the ERA states that:

"*"If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise) 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."*

33. Section 122(4) of the ERA provides as follows:

"*The amount of the basic award shall be reduced or further reduced by the amount of –*
(a) Any redundancy payment awarded by the tribunal under Part XI in respect of the same dismissal, or
(b) Any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of Part XI or otherwise).

34. When assessing compensation for unfair dismissal, the Tribunal must consider the possibility that the claimant's employment would have come to an end in any event. In ***Polkey v A E Dayton Services Ltd [1998] ICR 142*** the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (i.e., the employee would still have been dismissed) and

that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

35. In ***King and others v Eaton Ltd (No.2) [1998] IRLR 686***, Lord Prosser in the Court of Session stated that the question "*will be one of impression and judgment, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.*"

36. In ***Software 2000 Ltd v Andrews and others [2007] ICR 825***, the then President of the EAT, Mr. Justice Elias, reviewed the authorities on ***Polkey***. He summarised those authorities as including the following principles:

    a. In assessing compensation for unfair dismissal, the tribunal will normally have to assess how long the employee would have been employed but for the dismissal;

    b. If the employer argues the claimant would or may have been dismissed had a fair procedure been followed, the tribunal must have regard to any relevant evidence to that effect, even if it involves speculation and a degree of uncertainty; and

    c. There will be circumstances where the evidence is too unreliable for the tribunal to reconstruct what might have happened

37. Mr. Justice Elias also commented that "*The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed.*"

Submissions

Respondent

38. Mr. Boyd indicated that the respondent was not seeking to argue that the claimant had failed to mitigate her losses, and that, given the agreement reached in relation to figures, the only issues between the parties were:

    a. The treatment of the enhanced redundancy payment; and

    b. ***Polkey***.

39. Mr. Boyd submits that the operation of section 123(7) means that the excess redundancy payment should be offset against the compensatory award, not the losses. He relies on ***Digital Equipment Co. Ltd v Clements (No.2) [1998] ICR 258*** as authority for the proposition that, unlike ex gratia payments the deduction of the excess redundancy payment should come after any ***Polkey*** reduction.

40. The respondent also relies on the cases of ***Eversheds v De Belin [2011] UKEAT 0352/10*** and ***Software 2000 v Andrews [2001] ICR 825*** and argues that the Tribunal should take into account any material and reliable evidence when assessing compensation and appreciate that the mere fact that there is a degree of uncertainty and speculation involved in assessing what may have happened, should not cause the Tribunal to ignore the possibility that employment may have ended.

41. In relation to ***Polkey***, the respondent argues that:

    a. If the claimant had been pooled with Lucy Brear, the redundancy selection matrix would have been used and resulted in the claimant's selection for redundancy; and

    b. The claimant's losses were fully mitigated by the fact that she remained employed by the respondent for some time after the hypothetical consultation period would have ended, whilst it sought to redeploy her.

42. The Tribunal is, Mr. Boyd submits, bound to make a ***Polkey*** deduction unless it considers there is no reliable evidence that the claimant would have been dismissed. The EAT found that the 'mischief' in the dismissal was the failure to consult about putting the claimant in a pool of one, so the respondent had had to 'recreate the world' as it would have been had the claimant and Lucy Brear been pooled. This inevitably involves a degree if speculation and is not a counsel of perfection.

43. The selection criteria adopted by the respondent were in Mr. Boyd's submissions within the range of reasonable responses. The Tribunal should not re-score the claimant and Lucy Brear. It is clear that Mr. Saralaya considered Lucy Brear to be 'head and shoulders' above the claimant, and it is therefore very likely that if he had scored both of them at the time, the claimant would have been dismissed.

44. Finally, Mr. Boyd suggested that in assessing losses the Tribunal should take account of the fact that the claimant had been off sick for almost one year before she was dismissed and had been paid during that time. Her own evidence is that she could not work until January 2022, and it was therefore manifestly unlikely that her contract would have been renewed, even if she had been successful in the redundancy exercise.

Claimant

45. On behalf of the claimant Mr. Ohringer referred to ***Contract Bottling Ltd v Cave [2015] ICR 142*** in which Langstaff J emphasised that assessment of compensation and the appropriate amount of any ***Polkey*** reduction will inevitably 'involve a number of imponderables' but does not mean that the tribunal should not 'grapple with the issues'. The tribunal should consider not just whether a fair dismissal might have taken place, but also when it is likely to have done so.

46. Mr. Ohringer submits that the underlying question is what would have happened if the respondent had acted fairly (***Hill v Governing Body of Great Tey Primary School [2013] ICR 691***) and that fairness usually requires the employer to follow and apply its own procedures (***Westminster City Council v Cabaj [1996] ICR 960***).

47. Mr. Ohringer also quotes from the more recent judgment of the EAT in ***Teixeira v Zaika Restaurants Ltd [2023] IRLR 176***, in which HHJ Taylor commented that:

"*While the determination necessarily involves a degree of speculation, it must be based on evidence. The assessment is what the employer would have done if it had acted fairly, not what some other hypothetical fair employer would have done. The evidence should be considered with some circumspection, as a learning of experience is that employers are almost always adamant that dismissal was inevitable, while employees are equally certain that a fair procedure would have resulted in their retention in employment.*"

48. It is, Mr. Ohringer submits, very unlikely that the redundancy matrix would have been adopted had there been proper consultation. It was clear that Mr. Saralaya had made his decision at the very start of the process in April 2019 and wanted to dismiss the claimant. Any fair process would therefore have been a sham. Mr. Saralaya was not concerned with scoring in accordance with the matrix and evidence, but in line with his pre-determined views.

49. The respondent has, in the claimant's submissions, failed to show what would have happened if there had been consultation, a fair selection process and fair scoring. There was an overwhelming probability that had a proper process been followed the claimant would have been retained.

50. On the question of enhanced redundancy pay, Mr. Ohringer submitted that ***MacCulloch v Imperial Chemical Industries [2009] 11 WLUK 612*** is authority for the proposition that where there is a chance that the claimant would have been dismissed in any event, the compensatory award before any deductions must take into account the redundancy payment which they would have received upon that dismissal.

Conclusions

51. In reaching the following conclusions, I have taken account of the evidence before me, the legal principles summarised above, and the oral and written submissions of the parties.

52. I have carefully considered the question of whether to apply a ***Polkey*** reduction to any award, on the basis that there is a chance that the claimant would have been dismissed anyway, had a fair procedure been followed. In reaching my conclusions on this issue I recognise that it is for the respondent to structure the department as it sees fit, and to adopt redundancy selection criteria that it considers to be most appropriate for the future of that department.

53. Whilst is appears that the redundancy selection criteria do not closely reflect the requirements of the role that the claimant and Lucy Brear were carrying out, of greater concern is the fact that they give importance to tasks that only Lucy Brear was carrying out, specifically EPR. The claimant has not had the opportunity to demonstrate her ability in this area, and it appears unfair to score her down on a criterion that she has not had the opportunity to demonstrate.

54. This, and the way in which Mr. Saralaya spoke about the claimant and Lucy Brear when giving evidence, suggest a clear bias towards Lucy Brear both in the development of the selection criteria and in the scoring of the claimant and Ms. Brear against those criteria. Mr. Saralaya made no positive comments whatsoever about the claimant during his evidence and dismissed her qualifications, experience and contribution to the department. It cannot be said that he was objective in his scoring of the claimant.

55. In contrast he spoke very highly about Lucy Brear, made no criticisms whatsoever of her, and appeared to have taken account of her performance after the claimant was dismissed.

56. I have considered what would have happened if the respondent had acted fairly in this case and had applied fair selection criteria in an objective manner. I do not believe that it can be said, as Mr. Ohringer suggests, that the claimant would inevitably have been retained and Ms. Brear made redundant.

57. Had the respondent acted fairly, there would have been two employees in the pool for selection – the two band 6 nurses in the department, the claimant and Ms. Brear. I find that, given that there were two employees in the pool, there is a 50% chance that a fair process and fair selection criteria would have resulted in the claimant being made redundant. It would in my view be a step too far to say that the claimant would have been retained and Ms. Brear dismissed, or even that there is a greater than 50% chance she would have been retained.

58. Mr. Saralaya would inevitably, as head of department, been involved in the selection process, and there is in my view a 50% chance that, had he followed a proper process and scored objectively against the selection criteria, that the claimant would still have been selected for redundancy.

59. I have therefore decided to make a 50% ***Polkey*** reduction to reflect the chance that the claimant would have been dismissed in any event. There was no evidence before me as to how long a fair process would

have taken, and it would in my view be too speculative to try and assess how long the claimant would have been employed for had a fair procedure been followed. I therefore base the ***Polkey*** reduction on the percentage chance that the claimant would have been dismissed rather than the length of time it would have taken to follow a fair procedure.

60. I turn next to the question of the enhanced redundancy payment, and the order of adjustments. The Employment Tribunal Remedies Handbook 2022-23 suggests that when calculating the compensatory award, the correct order for adjustments is to apply a ***Polkey*** reduction to reflect the chance that the claimant would have been dismissed in any event, and then, once that has been done, to deduct any enhanced redundancy payment to the extent that it exceeds the basic award.

61. I see no reason in this case to depart from the approach set out in the Remedies Handbook. The ***MacCulloch*** case (decided before the current version of the Remedies Handbook was prepared and which I therefore assume takes account of that decision, even if it does not specifically refer to it) is in my view authority for the proposition that the correct approach is to assess a claimant's loss in accordance with section 123(3) of the ERA, and then under section 123(7) to reduce the award to be made by the amount of any enhanced redundancy payment.

62. Applying the above conclusions in this case:

a. The financial loss incurred by the claimant in this case is agreed at £57,871.85.

b. To that must be added the agreed sum of £500 for loss of statutory rights.

c. The addition of these two sums gives a total of £58,371.85.

d. That sum must be reduced by 50% to reflect the chance that the claimant would have been dismissed in any event.

e. The 50% reduction results in a net sum of £29,185.93.

f. From that must be deducted the enhanced redundancy payment of £17,431.88.

g. This results in a compensatory award of £11,754.05

63. The respondent is therefore ordered to pay the sum of £11,754.05 to the claimant.

Employment Judge Ayre

12 June 2023

JUDGMENT SENT TO THE PARTIES ON

23 June 2023

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FOR THE TRIBUNAL OFFICE