EMPLOYMENT TRIBUNALS

Claimant: **Mr William Clark**

Respondent: **Central Extrusions Ltd**

Heard at: **Birmingham by CVP** **On:** **30 June 2023**

Before: **Employment Judge Gilroy KC**

Representation

Claimant: In person
Respondent: Mr A Barnes (Counsel)

JUDGMENT

The Judgment of the Tribunal is as follows:

(1) The Claimant is awarded a basic award in the sum of £5,712.00.

(2) The Claimant is awarded a compensatory award in the sum of £1,998.31.

(3) The Claimant is therefore awarded total compensation in the sum of £7,710.31.

REASONS

1. This is the remedy judgment in respect of the claim of unfair dismissal brought by the Claimant against the Respondent. The Tribunal refers to its judgment containing full Reasons on the liability aspects of the case.

2. At the remedy hearing the Respondent was represented by Mr Barnes of Counsel in substitution for Ms Shaw. The Tribunal was again referred to certain of the documents provided at the liability hearing, principally in the form of the Claimant's wage slips from the employment he obtained after his dismissal by the Respondent. He also produced a number of versions of his Schedule of Loss, including a version drafted by him during the course of the remedy hearing and dated 30 June 2023, on the basis of a recalculation of the figures, and in particular the conversion of gross figures into net for ease of reference in terms of the calculations required.

3. As matters transpired, there was very little disagreement between the

parties on issues of remedy. In the first instance, it was agreed that the Claimant was entitled to a basic award in the sum of £5,712.00. There was further agreement that subject to the issue of Christmas bonus, referred to below, the net compensatory award before consideration of any uplift pursuant to the ACAS Code of Practice was £1,598.65.

4. In summary terms, the Claimant's effective date of termination of employment with the Respondent was 31 March 2022. Thereafter he worked for a company called Extrudaseal commencing on 20 April 2022 and ending on 14 September 2022. He then obtained a position with JCB, commencing on 5 October 2022 and this employment lasted until 28 October 2022. On 31 October 2022 the Claimant obtained fresh employment with a company called Soudal, at a level of remuneration which was the same level as he had enjoyed during his employment with the Respondent. It is therefore the position that essentially as far as loss of earnings are concerned, the Claimant reached a cut off point on 31 October 2022. The consequence of that is, as far as loss of salary is concerned, the Tribunal is dealing with a claim essentially of 7 months loss, taking account of the mitigation earnings derived by the Claimant from his employment with Extrudaseal and JCB.

5. The above narrative does not contain the figures for the simple reason that the parties were in agreement that taking account of the pre-dismissal salary enjoyed by the Claimant and the sums earned by him in his positions with Extrudaseal and JCB, his losses stood at £1,598.65.

6. The only issues between the parties were as follows:

   (a) The parties were originally in dispute as to whether or not the Claimant's pre-dismissal earnings should a figure in respect of Christmas bonus.

   (b) The parties were originally in dispute as to whether or not the ACAS Code of Practice uplift on (or indeed decrease from) compensation applied. The Respondent argued in the alternative that any uplift could be discounted, essentially because of the Claimant's conduct (as set out below).

7. In relation to the first issue namely the question of whether Christmas bonus should be included in the Claimant's pre-dismissal earnings for the purposes of calculating the compensatory award, I accepted Mr Barnes' argument that the pre-dismissal salary should not include the elements referable to Christmas bonus, applying the "just and equitable" test under s.123(1) of the Employment Rights Act 1996 which provides the Tribunal with its jurisdiction in terms of the compensatory award, given that the Tribunal is essentially dealing with a loss extending for 7 months post-dismissal.

8. In relation to the ACAS Code, where a party has acted in breach of a relevant code of practice, that is to say a code of practice relating to the resolution of disputes, the Tribunal has the power to increase or reduce by up to 25% the level of compensation if there has been an unreasonable

failure to comply with such a code. In this case, it is the ACAS Code of Practice which is engaged ("ACAS Code of Practice 1: Disciplinary and Grievance Procedures"). The power to take account of such matters is conferred by s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Unfair dismissal is a jurisdiction covered by that statutory provision.

9. I have had regard to the Code of Practice. Mr Barnes for the Respondent sought to argue that there were relevant considerations in terms of the Claimant's conduct, namely (a) his failure to clarify the basis of his appeal against dismissal; (b) steps taken by the Claimant after he left the Respondent's employment in terms of taking confidential details, utilising them for the benefit of his then employer (Extrudaseal) and being dismissed by Extrudaseal for that reason, and failing to cooperate with the Employment Tribunal procedure in terms of the prosecution of his claims. I rejected each of these points. I am not entirely convinced that I even have jurisdiction to consider conduct relating to the proceedings, but be that as it may, I reject the suggestion that any of those factors should be taken into account.

10. There are essentially 3 reasons why I consider that the maximum uplift of 25% to the compensatory award is appropriate.

11. First, it was not made clear to the Claimant exactly what disciplinary charge he was facing in the first place. His dismissal letter was unclear, it referred to a number of issues and even in relation to the issue that ultimately formed the basis of the decision to summarily dismiss him, that allegation was not clear from the invitation sent to the Claimant to attend a disciplinary hearing. The invitation to the disciplinary hearing *"about potential serious misconduct"* referred to four separate topics, the fourth of which: *"personal conduct and use of a word, could have led the company into disrepute or a potential claim"* was the singular matter upon which the decision was taken to summarily dismiss the Claimant. The invite to the disciplinary hearing was therefore clearly in breach of the ACAS Code and in particular paragraph 4.13 in terms of informing the employee of the basis upon which he may be disciplined.

12. The second matter I take into account is the fact that the dismissing officer in this case, Mr Thorpe, did not even conduct the disciplinary hearing. That hearing was conducted by a third party Ms Shaw, who communicated her findings to Mr Thorpe, who then presented the Claimant with a "fait accompli" dismissal at a meeting at which he produced a pre-dated and pre-signed letter informing him that he was being dismissed with immediate effect. As I found in my previous judgment, there was no attempt on the part of the Respondent (whether Mr Thorpe or Ms Shaw or anyone else) to ascertain from Mr Rollinson whether there was any truth in the case advanced by the Claimant which explained, as far as the Claimant was concerned, the context in which he used the word "spastic". That failure amounted to a breach of the ACAS Code on the basis of what it was the Respondent was seeking to ascertain and was being told about the alleged disciplinary offence.

13. The third matter I regard as representing a failure by the Respondent to follow the ACAS Code is in relation to the appeal. I need do no more than refer again to the witness statement of Mr Thorpe who is said to have made the decision to dismiss, where he stated, *"Bill Clark appealed to my decision which I could not uphold"*. This was a clear breach of the ACAS Code, a breach of the Respondent's own disciplinary procedure, and a breach of a fundamental principle of natural justice.

14. Mr Barnes argued in relation to all three matters that I should take into account that this was a small employer, that the disciplinary hearing took place during Covid, and that the Claimant was given the option of having someone else conduct the disciplinary hearing in the persons of Mr Thorpe, rather than Ms Shaw. I reject those factors as justifying any discount on the uplift I would otherwise apply. The size of the employer here is no excuse in relation to the fundamental failings which occurred in terms of principles of fairness and in particular breach of the ACAS Code of Practice. Covid is, in my judgment, nothing to the point, and whereas the Claimant was given the option of having someone other than Ms Shaw conduct the disciplinary hearing, this offer was only made to him midway through the disciplinary hearing.

15. It is therefore my judgment that the full 25% uplift is merited, which results in an uplift of the compensatory award to the sum of £1,998.31 producing a total figure for compensation of £7,710.31.

Employment Judge Gilroy KC
05 July 2023