EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Prodger**

Respondent: **ATN Marketing Limited**

Heard at: **Birmingham in person**

On: **11/7/23**

Before: **Employment Judge Beck**

Representation

Claimant: Mr Blitz, Counsel
Respondent: Mr Allen, Managing Director, Mr Tennant, Deputy Managing Director

RESERVED REMEDY JUDGMENT

The respondent is ordered to pay the claimant the sum of £33,819.07 comprising:

1. A basic award for unfair dismissal of £9,739.20.
2. A compensatory award for unfair dismissal of £21,101.60.
3. The sum of £2,485.07 for breach of contract (notice pay).
4. The sum of £493.82 for unlawful deduction from wages.

The claimant is responsible for any tax / national insurance contributions that may be payable on the above sums.

REASONS

Introduction and issues

1.The claimant was employed by the respondent as a territory sales executive, between 30/4/04, until her effective date of termination on the 3 /4/20.

2. In my reserved judgment on liability, dated 24/10/22, I found that the claimant was unfairly dismissed. I found her complaint of unlawful deduction from wages well founded, and her complaint of breach of contract for notice pay succeeded.

3. I determined in my judgment on liability dated 24/10/22, that no deduction should be made for contributory fault, or to reflect a chance that the claimant might have been dismissed in any event, which is often described as a Polkey reduction.

4. For today's remedy hearing I have received a 100-page bundle produced by the claimant's solicitors, and statements dated 5/6/23 from the claimant and respondent. I have heard evidence on oath from the claimant, and representations from both parties. The respondent did not seek to give evidence before the tribunal.

5. The claimant was born on the 9/12/54 and was aged 65 when she was dismissed on the 30/1/20. She did not seek re-instatement or re engagement, but compensation only. She confirmed in evidence she did not receive benefits after dismissal, so the recoupment provisions do not apply.

6. The issues to be determined at this remedy hearing:

If there is a compensatory award, how much should it be? The Tribunal will decide:

i. What financial losses has the dismissal caused the claimant?
ii. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
iii. If not, for what period of loss should the claimant be compensated?
iv. The ACAS Code of Practice on Disciplinary and Grievance Procedures applies, I have found in my liability judgment at paragraph 68 that the respondent breached the ACAS code, and the breaches of the ACAS code were unreasonable.
v. I have to determine is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
vi. Does the statutory cap of fifty-two weeks' pay or £86,444 apply?
vii. What basic award is payable to the claimant?
viii. What award is payable to the claimant in respect of her breach of contract complaint?
ix. What award is payable to the claimant in respect of her unlawful deduction from wages complaint?

The law on remedy

Compensation for unfair dismissal

7. An award of compensation is the most common result in unfair dismissal cases. It is assessed under two heads; the basic award and the compensatory award (see **section 118 of the Employment Rights Act 1996 ("ERA")).**

The basic award

8. The provisions relating to the basic award are contained in **ERA sections 119 to 122 and in section 126**. Such an award is, save in the case of very young employees, calculated in the same way as a statutory redundancy payment. The formula provides for the payment of a tax-free sum based on the number of full years' service, the employee has completed before dismissal. The employee receives half a week, a week or a week and a half's gross pay for each full year of service dependent on their age in that year. The amount of reckonable service is limited to 20 years so the highest possible multiple (which would be age dependent) is 30 weeks' pay. A week's pay is subject to a statutory maximum which, at the time of the claimant's dismissal stood at £525 (see **ERA section 227**). As the claimant was aged 65 when she was dismissed, the relevant rate is a week's and a half's gross pay, capped at £525, for each full year of service.

9.The Tribunal has limited power to reduce a basic award. It can do so where an employee has unreasonably refused an offer of reinstatement but that does not apply in this case. It may also reduce a basic award if it considers that any conduct of the employee prior to dismissal (or the giving of notice of dismissal) was such that it would be just and equitable to reduce the basic award **(ERA section 122(2)**). I have determined in paragraph 67 of my liability judgment that this is not applicable to either the basic or compensatory award.

The compensatory award

10.The provisions relating to the compensatory award are contained in **ERA sections 123, 124, 124A and 126**. The basic principles underlying the calculation of compensation is described in **section 123(1) & (2**) as follows:

123. Compensatory award

(1) Subject to the provisions of this section and sections 124, 124A 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.
(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

Calculating loss

11.A compensatory award is intended to compensate for loss actually suffered and not to penalise the employer for its actions (see **Optimum Group Services plc v Muir [2013] IRLR 339)**. Furthermore, where a loss of earnings would have been taxable in a claimant's hands, loss must be calculated net of tax and NI (see **British Transport Commission v Gourley [1956] AC 185)**. The relevant questions are: whether the loss was occasioned or caused by the dismissal; whether it is attributable to the

conduct of the employer; and whether it is just and equitable to award compensation. This final requirement is an overriding one imposed by the statute, so in some cases, despite proof of substantial losses, there may be no or a reduced award of compensation because it is not just and equitable to award more (see **W Devis & Sons Limited v Atkins [1977] IRLR 314)**. An example might be where dishonest conduct by a dismissed employee during employment is only discovered after his or her dismissal: that is not the position in this case though.

12.In **Dunnachie v Kingston Upon Hull City Council [2004] IRLR 727** the House of Lords confirmed that an award for injury to feelings was not available under **ERA 1996 s 123(1),** which does not permit the recovery of non-economic losses (such as general damages for personal injury). Permissible heads of loss include past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights and accrued statutory notice. This last head of loss reflects the fact that the dismissed employee will have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed and will have to "re-earn" their minimum statutory notice period; the award is generally for a conventional amount somewhere in the region of £500.

13.In determining the amount of an employee's loss, the Tribunal must decide what would have happened but for the unfair dismissal. The probable consequence in some cases would have been no dismissal but for the unfairness and in others the probability is that the employee would have been dismissed in any event. In the former case losses may be open-ended (subject to it being just and equitable to award them and the statutory cap discussed below); in the latter losses will be limited to the period in which a fair process would have been completed and, in some instances, may be nothing at all (see **Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604)**. Inevitably, as the assessment is of events which did not occur, it requires the Tribunal to exercise its judgment based on the inferences it is reasonable to draw from the primary facts.

Polkey

14.It is difficult in some cases to be certain whether the dismissal would have occurred had the employer acted fairly. Classically this problem arises in circumstances where the employer has failed to act fairly because it has failed to apply certain procedural safeguards which might, had they been applied, have led to the employee retaining her job. Prior to the decision in **Polkey v AE Dayton Services Ltd [1987] IRLR 503 H**L, the courts took the view that, if on the balance of possibilities, the dismissal would have occurred, then the dismissal should be held to be fair; the House of Lords in Polkey held that this was not good law. Lord Bridge said that the chances of whether the employee would have been retained must be taken into account when calculating the compensation to be paid to the employee but not the basic award. Accordingly, if the prospects of the employee having kept his job had proper procedures been complied with were slender, then there would be a significant reduction in compensation: this is sometimes referred to as "the Polkey reduction" or simply as

"Polkey". Tribunals are required to take a common-sense approach when assessing whether a Polkey reduction is appropriate and the amount of any such reduction (**Software 2000 Limited v Andrews [2007] IRLR 568**); the nature of the exercise is necessarily "broad brush" (**Croydon Health care Services v Beatt [2017] IRLR 274**).

15.The Polkey reduction does not apply to the basic award for unfair dismissal, where the test is whether the employee's conduct makes it just and equitable to reduce or extinguish the award. These questions may turn on the same evidence as Polkey though.

16. I found at paragraph 66 of my decision on liability that there should be no Polkey reduction.

Mitigation

17.An employee who has been unfairly dismissed is under the same duty to mitigate her losses as all claimants in any civil proceedings. The duty to mitigate only arises after the dismissal and it requires the employee to take reasonable (and not all possible) steps to reduce her losses to the lowest reasonable amount. The burden of proving a failure by a claimant to mitigate lies on the respondent (see **Wilding v British Telecommunications plc [2002] ICR 79 and Cooper Contracting Limited v Lindsey [2015] UKEAT/0184). In Singh v Glass Express Midlands Limited [2018] UKEAT/0071,** HHJ Eady QC gave the following guidance on the correct approach to the question of mitigation:
(1) The burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
(2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
(3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
(4) There is a difference between acting reasonably and not acting unreasonably.
(5) What is reasonable or unreasonable is a matter of fact.
(6) That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the ET's assessment of reasonableness – and not the claimant's – that counts.
(7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
(8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.
(9) In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

The statutory cap

18.**ERA section 124** places a cap on the compensatory award for unfair

dismissal which, at the date of the claimant's dismissal, was the lower of £80,541 or 52 weeks' pay.

Basic Award

19. The parties agreed to the calculation of the claimant's gross weekly wage for the purposes of the basic award. It included the commission she was in receipt of, which was part of the claimant's normal remuneration. This was based upon the salary received during the period February, March and April 2020. The parties agreed to the figure of £405.80 gross weekly salary.

20. The schedule of loss submitted by the claimants' solicitors on page 57 of the bundle included a gross weekly wage figure of £744.45. This was based on October, November and December 2019 wage slips, which Mr Blitz accepted was an incorrect calculation, based on **section 221 (3) ERA (1996)**, which required the last 12 weeks before the calculation date to be taken into account.

21. The parties agreed the basic award was based on 16 years' service, and the claimant being entitled to 1 ½ weeks' pay for each of those 16 years, on the grounds she was over 41 years old. **£405.80 x 1.5 x 16 = £9,739.20 gross.**

Compensatory Award

22. The parties were not able to agree on the figure that should be used to calculate any compensatory award. The claimant's position was that an average figure of £744.45 should be used, for the claimant's gross weekly wage, which was the average of the claimants October, November and December 2019 pay slips. This was the amount put forward in the claimant's schedule of loss, the net weekly wage being £528.59.

23. The respondent argued that this 3-month period represented 37.2% of the claimant's total pay for that full year period, and a more appropriate reference period would be January – December 2019. An aggregate of the 12-month net figures gave a salary of £19,532.15, and a net weekly figure of £375.62. The respondent accepted this did not include 3% for employer's pension contributions.

24. **Section 221(3) ERA (1996)** does not apply in the calculation of a week's pay for the purposes of the compensatory award. The tribunal is required to ascertain the claimant's true losses, there is no upper limit on a week's pay for these purposes. The tribunal is required to determine the claimant's weekly net wage.

25. In calculating a week's pay for the purposes of the compensatory award, it seems appropriate to consider the parties have agreed the gross weekly figure based on February, March and April 2020, of £405.80.

26. As I am required to make an award based on actual losses, it seems fair, reasonable, and appropriate to base this on the average wages received by the claimant between January – December 2019, as suggested by the respondent. I take this view because, as both parties have accepted, the claimants' weekly wage did vary over the year, taking into account higher amounts of commission were paid during busier periods. By using the period January to December 2019, it takes into account the peaks and troughs of sales throughout a full year.

27. Therefore for the purposes of the calculation of the compensatory award, I accept the figures provided by the respondent, that the net salary for January – December 2019 was £19,532.15, the net weekly wage being £375.62.

28. Mr Blitz helpfully checked during the hearing that the net weekly wage figure of £375.62 complied with the National Minimum Wage requirements, and agreed this figure was correct if I sought to rely on it. Both parties accepted that this figure did not include a 3% employers' pension contribution, and this would need to be added to any award.

29.I refer to paragraph 66 of my liability judgement, in which I determined that in my view if the respondent had followed the correct procedures, the claimant would not have been dismissed. Also, my finding in paragraph 67, that the claimant did not contribute to the dismissal by her actions.

30.The claimant gave evidence that she was in disbelief when she was dismissed aged 65, after 16 years of what she described as loyal service. She advised the tribunal she loved her job and had no plans to leave it, was not considering retiring from her role. She had worked in the sales industry for 25 years.

31.She states the dismissal affected her confidence, to the extent that she sought help from her sister-in-law who is a psychiatric nurse, although she did not visit her GP. She questioned her own judgment at the time, lost confidence, had difficulty sleeping and lost weight due to a lack of appetite. She did not apply for jobs straight away, but began looking in the latter part of 2020, but she could not find any similar vacancies. When cross examined, she confirmed she looked at ‘total jobs’ and could not find any similar roles.

32. Mr Blitz made representations, that the claimant would have been in a position to obtain a job within 12 months and sought loss of earnings based on a 12-month period. He pointed out the impact of the national lockdowns which took place in 2020 and made representations that similar jobs in sales would not have been available during this time due the impact of covid and national lockdowns. Whilst the claimant began drawing her pension in December 2020 aged 66, this was a benefit she was entitled to, and this should not be taken into account in any calculation.

33.Mr Tenant accepted the impact of covid but made representations the claimant had not mitigated her losses and taken reasonable steps to find employment. No evidence of jobs which were available and appropriate for the claimant at the time were produced by the respondent. Mr Tenant made representations that the claimant should be entitled to loss of earnings for a 3-month period.

34.I accept the claimant’s evidence that the impact of the dismissal upon her was a loss of confidence, lack of appetite and a loss of weight. She had worked for the respondent for 16 years without any oral or written warnings being recorded in her record. (paragraph 23 of my liability judgment). Whilst she has not provided evidence of job searches, she undertook, I remind myself of the burden of proof, which is on the respondent to prove a failure to mitigate losses, and that the claimant acted unreasonably. The respondent has not provided any evidence of jobs which were available at the time, which the claimant failed to apply for. I accept it was reasonable that the claimant did not look for a role immediately, taking time to look after her own well-being when she was dismissed from a role, she was passionate about.

35.I have considered the period to which this claim relates. The UK entered the first national lock down on the 23/3/20 - 23/6/20. A second national lockdown was in place between 5/11/20 and 2/12/20. A third national lockdown took place between January 2021 and March 2021. For 6 months of the period of 12 months for the claimant seeking loss of earnings, the UK were operating under instructions which required people to stay at home. Other restrictions were in place during the remainder of the period, regarding restricted numbers meeting up, keeping 2 metres away from others, schools being closed, retail premises being shut.

36.I accept against the background of Covid restrictions, it would have been reasonable for the claimant to start searching for jobs in the later part of 2020 and accept her evidence that she made attempts to do so. The reality is this period was then followed by 2 further national lockdowns, in December 2020 and January 2021, which would have made it very difficult for the claimant to find a job. In coming to this conclusion, I take into account the nature of the sales role she undertook, which was driving round retail premises selling stock lines. Even if she had tried for example to obtain a retail role at this time, I accept it would have been very difficult to achieve with many staff on furlough or shops operating on reduced hours / staff.

37.I also take into account the claimants age, and at 66 the fact that it would have been more difficult to obtain another role. It seems reasonable that, after the UK came out of the third lockdown in March 2021, and things were returning slowly to normal, it would have been reasonable for the claimant to have obtained a new job by this stage. I do not find that the respondent has proved the claimant acted unreasonably in failing to mitigate her losses. Therefore, I find that the claimant is entitled to recover her loss of earnings for a 12-month period from April 2020 to April 2021.

38.The parties have accepted that a 3% pension contribution would need to be added to any compensatory figure. Based on the calculation provided in the claimant's schedule of loss, a weekly contribution of £27.49, based on the last 12 weeks wages before her dismissal, I adopt these figures. **The claimants' weekly net wage is £375.62 + £27.49 = £403.11.**

39.The compensatory award is therefore **52 weeks x £403.11 = £20,961.72.**

ACAS Uplift

40.I refer to paragraphs 51, 52 and 61 of my liability judgment. I determined that there were breaches of the ACAS Code 1 disciplinary and grievance procedures (2015) in respect of paragraphs 9,10,11,12,13,18, and 22 of the code.

41. Mr Blitz on behalf of the claimant, makes representations that the breaches of the codes of practice are significant and substantial, and should attract a maximum 25% uplift.

42.Mr Tenant made representations that whilst the respondent accepts technical breaches of the codes, the severity of the breaches did not merit a 25% uplift on the award. The respondent's position is that the breaches had little impact on the dismissal, and that a 5% uplift was more appropriate.

43.I remind myself, that the respondent accepted breaches of the ACAS code, in respect of not advising the claimant the 10/1/20 meeting could result in dismissal, not informing her of her right to appeal, not considering alternative employment or provide written confirmation of dismissal until the 8/3/20.

44.In paragraph 68 of my liability judgment I determined the breaches of the codes were unreasonable. They relate to fundamental matters such as the employee not being provided with written evidence in advance of the disciplinary meeting, no notification of the right to be accompanied, or being allowed to set out their case in response, or notification of the action taken in writing. I have a discretion in accordance with **section 207A Trade Union and Labour Relations (Consolidation) Act (1992)**, if I consider it just and equitable in the circumstances, to increase any award to the employee by up to 25%. Because of the fundamental nature of the breaches of the code in this case, which were serious, I consider an uplift of 25% to be just and equitable in the circumstances.

Notice Pay

45.The claimant's effective date of termination was the 3/ 4/20. She was entitled under her contract to 12 weeks' notice which expired on the 3 /4/20. The claim is for 9 weeks' notice pay, based upon the fact the claimant has made a separate claim for deduction from wages for the period 10/1/20 to 30/1/20. Mr Blitz explained the figures in the schedule of loss were based on average net weekly wage figures from October, November and December 2019 pay slips, because the claimant has not received wage slips for the February – April 2020 period. The net weekly figure was calculated at £528.59.

46. I refer to my findings in paragraph 71 of my liability judgement. The claimant is entitled to a period of 9 weeks' remaining notice pay. The claimant's evidence she was paid £1,013.76 in February 2020 and £961.27 in March 2020 has not been challenged. I accept the claimant's evidence that in April 2020 she was paid £297.21. This is total pay over this 3-month period of £2,272.24. Whilst the respondent indicated it had paid £2674.00 in notice pay, I have not seen any evidence of this amount.

47.There was discussion concerning whether the figures of £2,272.24 included crystalized commission figures. Mr Blitz suggested that the claimant may be due a higher figure but could only base that on for example the net monthly pay figure for the previous year, March and April 2019 being £3,663.64, or March, April and May 2019 being a net figure of £3,522.70. Mr Tenant did not agree with these figures but was unable to clarify the position further.

47.I took the view the calculations put forward at paragraph 47 were speculative, and the fairest basis for the calculation was based upon the initial calculation provided to me, which included a deduction for actual salary received which had been confirmed by the claimant. Therefore, **9 weeks' notice pay x £528.59= £4,757.31 - £2,272,24 = £2,485.07 due in notice pay.**

Unlawful deduction from wages

48.I made a finding in paragraph 39 of my liability judgement, that the claimant worked for the period 10/1/20 - 30/1/20. She is entitled to receive her salary in full for this 3 week / 15-day period. I also made a finding in paragraph 76 of the liability

judgment, that this should be reduced by 3 days, which the claimant accepted she had taken as additional holiday.

49.The claimant indicated she should have been paid £1,326.31 for January 2020 salary, receiving £926.84 according to her salary slip on page 148. I invited the claimant to set out how the claim for the difference, 399.47, was calculated.

50.Both parties agreed that the claimants basic pay was £891.62 a month. Mr Blitz calculated £891.62 x 12 divided by 52 weeks = £205.76 weekly basic wage.
To reflect the 3-week period she worked, £205.76 x 3 = £617.21. To allow a deduction for the 3 days extra holiday, the daily basic pay was £617.21 divided by 15 days x 12 days= £493.82. Mr Blitz confirmed this was the claim made, for £493.82.

51.Whilst Mr Tenant accepted the monthly basic pay of £891.62, he stated £411.52 had been paid, but could not show how he had calculated this figure. He indicated the balance of £480.10 was the actual basic pay due with a deduction required for the 3 days holiday.

52.I am adopting the figures provided by Mr Blitz in the calculation of the outstanding wages, as I believe it reflects a more accurate position. **Therefore, I order £493.82 as an unlawful deduction from wages.**

Calculations

Basic award	**£ 9,739.20 gross**
Compensatory award	£20, 961.72 net
Deduction for part notice pay already paid	- £ 2,274.24
	£18,687.48
25% ACAS Uplift to Compensatory award	£ 4,671.87
Compensatory award	£23,359.35
Application of statutory CAP to Compensatory Award (£405.80 gross weekly wage x 52)	**£21,101.60**
Reduction of Compensatory award by amount in excess of Statutory CAP	**- £ 2,257.75**
Final Compensatory	**£21,101.60**

Award

Remaining notice pay due	**£ 2,485.07**
Unlawful deduction from wages	**£ 493.82**

Total	**£33,819.07**

Employment Judge Beck
01 September 2023