Case No: 1306989/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr Daniel Williams**

Respondent: **Jaguar Land Rover Limited**

Heard at: **Midlands West** **On:** **26 July 2023**

Before: **Employment Judge Woffenden**
Member: Mr KW Hutchinson
Representation
Claimant: In Person
Respondent: Mr T Perry of Counsel

RESERVED REMEDY JUDGMENT

The respondent will pay the claimant compensation for unfair dismissal and for discrimination in the sum of £ 147572.75 as set out in the schedule attached.

REASONS

Introduction

1The claimant's claims under sections 15 Equality Act 2010 and for unfair dismissal having succeeded, a remedy hearing was listed for 26 July 2023. Mr Hutchinson attended by CVP .Mr Simpson did not attend and could not be contacted but the parties gave written consent to the proceedings being heard by Employment Judge Woffenden and Mr Hutchinson.

Evidence

2 The parties had agreed a bundle of documents for use at the remedy hearing (405 pages) which included another witness statement for the claimant. However the parties had already prepared for the final hearing (witness statements and agreed bundle) on the basis that it would determine both liability and remedy issues. No permission had been sought for reliance on any additional documentary evidence or the service of any additional witness statements nor had a preliminary hearing for case management purposes been requested .This

having been pointed out to the parties, at the commencement of the hearing permission was sought to rely on that additional evidence which was granted for reasons given at the time, The tribunal therefore heard evidence from the claimant and had regard to those documents in the agreed bundle of remedy documents to which the parties referred in witness statements or under cross examination. The claimant did not ask for a recommendation or any remedy for unfair dismissal other than compensation.

Issues

3 The remaining issues to be determined by the tribunal were therefore as follows:

Remedy for unfair dismissal

3.1 What basic award is payable to the claimant, if any?

Remedy for discrimination

3.2 What financial losses has the discrimination caused the claimant?

3.4 Has the claimant taken reasonable steps to replace lost earnings?

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

3.6 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

3.8 Did he cause or contribute to dismissal by blameworthy conduct If so, would it be just and equitable to reduce the claimant's award? By what proportion?

3.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.10 Did the respondent unreasonably fail to comply with it ()?

3.11 If so is it just and equitable to increase or decrease any award payable to the claimant?

3.12 By what proportion, up to 25%?

3.13 Should interest be awarded? How much?

Fact Finding

4 The claimant was employed by the respondent as a production operative from 12 April 2014 to 19 March 2020. His date of birth is 27 June 1991.He worked for

the respondent for almost 6 years. On dismissal he was paid £4400 pay in lieu of notice (‘PILON’).

5 Following his dismissal (which we concluded was unfavourable treatment under section 15 Equality Act 2010 and unfair) the claimant lived with his parents in Coleshill ,living on the PILON. The claimant did not seek any medical treatment. However during the immediate aftermath he became a recluse, not wanting to go out take telephone calls or engage with his family, and was unable to sleep because the circumstances around his dismissal were ‘on repeat’ in his head. He felt worthless sad and angry about losing his job which he had had for 6 years and felt upset at being unable to provide for his daughter as he once had done.

6 On 23 March 2020 a national lockdown due to the Coronavirus pandemic began . Most lockdown restrictions were lifted on 4 July 2020 and when the PILON ran out in July 2020 the claimant began to look for work. He did not have a driving licence but had been able to attend work at the respondent because he had colleagues on the same shifts as him with whom he was able to car share. That was no longer available to him and the local bus service was limited. There was one bus into Birmingham which started at 5 am and made 6 am starts impossible. He looked for work at the factories located in the industrial estates near his parent’s home but without success.

7 The claimant was receiving Universal Credit by this time and it was suggested to him that he should retrain as a plumber . With the encouragement of his parents and in view of his difficulties in finding employment he decided to do so ,embarking on a free 1 year course which ran from 10 September 2020 till September 2021(2 days a week) to obtain a level 2 diploma in plumbing. The course ran throughout the year (not term time only). He had not been able to find work in what he described as the unprecedented times of furlough and redundancies and believed that retraining would be the best way for him in due course to achieve the same salary he had been paid by the respondent.

8 While he was on the plumbing course the claimant’s ability to work was limited to those part time roles which would also accommodate his child care responsibilities for his daughter and to which he could travel on local transport in the absence of a driving licence.

9 Under cross examination the claimant acknowledged that he had not been aware of and had not applied for jobs at HS2 apparently available from 30 June 2020 but such work was not within his experience and he did not have the requisite qualifications (which include a Sentinel card) nor did he have the means to travel to sites. . Such searches that he did carry out had been for manufacturing jobs. When he thought seasonal work would be available in December 2020 he applied for work asking at a local Aldi and Boots but without success. Competition for retail roles at supermarkets and the like was very fierce. He had not applied for roles over the festive season with Amazon at its Rugeley site (which he estimated would take him approximately 30 to 45 minutes travel time each way) but his ability to undertake such work was still circumscribed for the reasons set out at paragraph 8 above

10 By February 2021 the claimant had signed up with an agency and secured 1 day’s work at BMW Hams Hall (an automotive production site) covering for someone who had not turned up that day. He began to look for

work as a plumbers' mate making google searches for local plumbers and telephoning them directly to ask for work.

11 After successful completion of his plumbing course on or around 9 September 2021 the claimant began working on a self-employed basis (with a company called Hardyman) .

12 By 27 March 2023 the claimant secured a full time employed role as a heating and ventilation engineer though he is not yet earning the salary he was paid by the respondent and thinks it will take him about another year to do so.

13 The claimant passed his driving test first time in February 2023. He had been unable to do so any earlier because he had found it difficult due to Covid restrictions to find a driving instructor (for whose services there was a heavy demand post Covid restrictions) and there had also been a backlog in tests.

The Law

Remedy for Unfair dismissal

14 Under section 119 Employment Rights Act 1996 ('ERA'):
'(1)Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
(a)determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
(b)reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c)allowing the appropriate amount for each of those years of employment.
(2)In subsection (1)(c) "the appropriate amount" means—
(a)one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b)one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c)half a week's pay for a year of employment not within paragraph (a) or (b).'

15 A basic award is calculated in a similar way to a statutory redundancy payment.

16 Under section 122 (2 ERA)
Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.
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17 Under section 123 (1) ERA:
'(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.'

18 Under section 123 (4) ERA:

(4)In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.'

19 The tribunal may reduce the compensatory award to reflect the chance that the employee may have been dismissed in any case at some point **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**,

20 Under section 123 (6) ERA:

(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

21 For the purposes of section 123 (6) ERA the following factors need to be established

a) the conduct must be culpable or blameworthy;
b) the conduct must have actually caused or contributed to the dismissal ;and
c) it must be just and equitable to reduce the award by the proportion specified (**Nelson v BBC (N0 2) 1980 ICR 110 CA**

Remedy for Discrimination

22 Under section 124 Equality Act 2010 ('EqA') the following discretionary remedies are available: a declaration as to the rights of the parties ,an order for compensation to be paid to the claimant and an appropriate recommendation.
'(1)This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
(2)The tribunal may—
(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
(b)order the respondent to pay compensation to the complainant;
(c)make an appropriate recommendation.'

23 In **Ministry of Defence v Cannock and Others ICR 918**,the EAT said in relation to compensation that the aim is 'as best as money can do it, the applicant must be put in the position she (or he) would have been in but for the unlawful conduct.' The tribunal must ascertain the position the claimant would have been in had the discrimination not occurred. Causation requires tribunals to form a view about what would have happened, despite many unpredictable factors. The question of what loss is caused by a particular act of discrimination is related to the question, in a discriminatory dismissal case, of whether the employee could or would have been fairly dismissed were it not for the discrimination. Tribunals may need to consider whether, were it not for the discriminatory dismissal, there could have been a non-discriminatory dismissal at the same time, or whether there would have been a non-discriminatory dismissal at some definable point in the future. The chance that the claimant could or would have been dismissed in

any event, with no discrimination, can be recognised by making a reduction in compensation for future loss. This may take the form of a percentage reduction to reflect a chance. It may also be possible to say that employment would have come to an end in any event by a certain point. In **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**, the House of Lords established that where a dismissal was procedurally unfair, but the employer could show that there was a significant chance that, had it followed a fair procedure, it would have dismissed anyway, compensation could be reduced. A respondent can rely on **Polkey** in discrimination cases to contend there should be a reduction in compensation because a fair dismissal was likely at some point in the future. In **Abbey National plc and anor v Chagger 2010 ICR 397** CA. Lord Justice Elias stated that the possibility of dismissal of the claimant had to be factored into the measure of loss. An employment tribunal might also consider the chance of the claimant remaining in employment in any event. It may also be necessary to consider if the chain of causation has been broken (**Essa v Laing Ltd [2004]IRLR 313 CA)**.

24 Compensation (e.g., for loss of earnings) may overlap in the claims of unfair and discrimination. Double recovery must be avoided. Section 126 ERA prevents double recovery, but does not specify when the award should be made as compensation for unfair dismissal or discrimination. In these circumstances, the EAT has suggested that tribunals should award compensation under the discrimination legislation, thereby avoiding the cap on the unfair dismissal compensatory award (**D'Souza v London Borough of Lambeth 1997 IRLR 677, EAT).**

25 In relation to compensation for discrimination the tribunal uses the same principles as far as mitigation is concerned as it does in relation to compensation for unfair dismissal. Any claimant will be expected to mitigate the losses they suffer as a result of an unlawful act by giving credit for earnings in a new job. The tribunal will not make an award for losses that could reasonably have been avoided .The claimant is expected to take reasonable steps to minimise the losses suffered as a consequence of the unlawful act .The respondent has the burden of proving a failure to mitigate (**Fylde v Scientific Commissioning Ltd 1989 IRLR 331**). It is insufficient for a respondent merely to show the claimant failed to take a step that it was reasonable to take. The respondent has to prove the claimant acted unreasonably .If the claimant failed to take a reasonable step the respondent has to show any such failure was unreasonable.

26 Tribunals may make an award for injury to feelings in discrimination cases. The tribunal bears in mind that compensation is designed to compensate the injured party rather than punish the guilty one .Awards should bear some relation to those made by the courts in personal injury .The tribunal follows guidelines first given in **Vento v Chief Constable of West Yorkshire Police[2003] ICR 318** in which the 3 broad bands of compensation for injury to feelings were set out as follows:

i) The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. This case falls within that band. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.

ii) The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.

iii) Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. In general, awards of less than £500 are to be avoided altogether, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

27 In **Vento** it was stated at paragraph 66 that 'There is, of course, within each band considerable flexibility, allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case'.

28 The **Vento** bands applicable to cases issued before April 2020 were:

a. lower band of £900 to £8,800 (less serious cases);

b. middle band of £8,800 to £26,300 (cases that do not merit an award in the upper band); and

c. upper band of £26,300 to £44,000 (the most serious cases), with the most exceptional cases capable of exceeding £44,000.

29 As far as contributory fault is concerned it is said in Harvey that '*it has been held that, as a matter of principle, a reduction in compensation can be made in an award of compensation for discrimination on the basis of contributory negligence. In Way v Crouch [2005] IRLR 603, [2005] ICR 1362, EAT, it was held that this might be possible because statute deems the wrong which unlawful discrimination comprises, to be compensated as though it were a tort (delict), and in tortious (delictual) claims, a deduction for contributory negligence on the part of the claimant (pursuer) is permitted under the Law Reform (Contributory Negligence) Act 1945.*
Way v Crouch needs, however, to be read with some caution. First, in respect of its pronouncements as to how the contribution of individual tortfeasors should be assessed – see Bungay v Saini UKEAT/0331/10, [2011] EqLR 1130, EAT, and para [865] below. Second, because in First Greater Western Ltd v Waiyego UKEAT/0056/18 (6 December 2018, unreported), the EAT (Kerr J presiding) held that, while the 1945 Act is technically applicable to at least some forms of discrimination, the statement in Way v Crouch was too wide; it was difficult to apply the concept of 'fault' in discrimination cases, not least as a discriminator may act without fault, as that term was to be understood under the 1945 Act. Kerr J further observed that the anti-discrimination legislation did not include a bespoke statutory provision dealing with contributory fault and it was likely that one would have been enacted if the legislature had intended there to be a power to reduce compensation by reason of the victim's conduct. More generally, the notion of contributory negligence in the context of discrimination is both perilous and difficult to apply and there was a real danger that the essence of the right not to be discriminated against could be impaired if allegations of contributory negligence could be readily made and entertained.

30 A tribunal can increase an award by up to 25% if an ACAS Code applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2. and there has been an unreasonable failure by a party to comply with it (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA ")). Schedule A2 includes: Sections 120 and 127 of the Equality Act 2010 (discrimination etc in work cases) and section 111 (unfair dismissal). The Code of Practice on

Disciplinary and Grievance Procedures (2015) ("the ACAS Code") applies when culpable conduct is involved **(Holmes v QuinetiQ UKEAT/0206/15/BA) .**

31 When a tribunal calculates compensation for discrimination, it is obliged to consider awarding interest. If it decides to do so, interest is calculated from the date of the act of discrimination up to the date of the calculation, save for interest on lost wages, where the calculation is made from the middle of that period. The tribunal will then include that interest in the award made.

Conclusions

32 The claimant was paid in lieu of notice. The parties agree that the claimant is entitled to a basic award of £3150. Indeed none of the claimant's figures are disputed by the respondent ;what is in dispute is how the relevant legal principles should be applied to that facts of this case.

33 We have found the act of unlawful discrimination was the claimant's dismissal. It is appropriate to award the Claimant his loss of earnings as compensation for unlawful discrimination rather than as part of the compensatory award for unfair dismissal.

34 Mr Perry submits in his written submissions that had he not been dismissed 'it is possible that C would still have been dismissed without discrimination in a very short period'. He submitted there is no general rule that 'disability absences have to be discounted under either the AMP or the law generally.' He referred us to paragraph 88 of our conclusions in our liability judgement .We think what he had in mind was our observation within that paragraph that if the AMP had been applied the dismissal could have been avoided or delayed. However, there was no evidence put before us from which we could reach any conclusions about the outcome of the AMP had it been applied to the claimant in a non-discriminatory way or how long the process would have taken to conclude in those circumstances. Neither party has put before us any additional medical evidence and the most up to date OH evidence before us at the liability hearing was that the claimant had been found fit to return to work on 10 February 2020 and after a graduated return to normal hours would have been back to full time work by 3 weeks later (2 March 2020). By 19 March 2020 the claimant's health issues were (on the account of his representative in the internal process) pretty much resolved and he was in receipt of CBT. What appears to have prevented his return to work was his dismissal and unsuccessful appeal. Even when he was dismissed he did not feel the need to avail himself of medical treatment and, notwithstanding the adverse effects of the dismissal ,by July 2020 with the lifting of the lockdown he was able to look for work. We cannot say that on the evidence before us that dismissal would have been delayed for a very short period.

35 We conclude that if he had not been dismissed he would have been back at work full time by 2 March 2020 and would have either been furloughed or continued working (as the case may be) at the respondent during the pandemic. There is no evidence that his employment would have ended; he did not want to leave. He emphasised to Mr Hoursoglou at the appeal how much he wanted to stay. There was no evidence before us of the recurrence (or likelihood of recurrence) of episodes of anxiety and depression which might have resulted in the application of the AMP and ultimately his dismissal. Mr Perry submitted that it is 'more likely still' even if the decision had not been taken to dismiss the

claimant at that time he would still have been subject to the terms of the AMP. He points to 2 absences unrelated to disability (the incident relating to child care and the day the claimant's then girlfriend got locked in the house) which he suggested amounts to a 'clear pattern of behaviour on C's part that was antagonistic to being managed'. We cannot agree that 2 instances of non-disability related absences amount to a clear pattern of behaviour at all , let alone that (occurring as they did when the claimant – a disabled person because of anxiety and depression) was being subjected to an AMP the terms of which were not being applied by the respondent) they indicate he was antagonistic to being managed.

36 We reject Mr Perry's submission that the claimant would have been dismissed fairly within 6 months ;there is no evidence before us which would lead us to conclude he would not have stayed in employment during the Covid pandemic and beyond in what was a very well paid job with a pension for a prestigious local employer that enabled him to provide for his daughter.

37 We now consider mitigation. Mr Perry submitted that the steps the claimant should have taken to mitigate loss were:

'a. Conducting a more thorough search for employment from Summer 2020.

b. Waiting longer before deciding to retrain as a plumber.

c. Working part time whilst studying.

3. It was unreasonable for him to have failed to take any such steps because

a. he was well enough to work from around July 2020;

b. There is no objective evidence of his doing any search for work from July 2020. The only evidence is of one application in October 2020 and then a handful of applications in December 2020.

c. he failed to register with any employment agencies before February 2021;

d. he failed to search for roles online;

e. he moved to retrain after a relatively short period during which he had failed to conduct any kind of thorough search for employment;

f. There were at least three weekdays per week that he was not studying and when he could have worked (plus possibly weekends).

38 In our judgment the claimant has taken reasonable steps to minimise the losses suffered as a consequence of the unlawful act of dismissal as and when he was in a position to do so having regard to his personal circumstances (his previous experience in manufacturing, his inability to drive or to learn to drive ,his childcare responsibilities and where he lived) set against the prevailing background of the covid pandemic. His move to retrain at a time when his efforts to obtain work had been unsuccessful was not unreasonable nor were the steps he took after commencing training unreasonable in the light of the circumstances set out in paragraph 8 above.

39 Although Mr Perry accepted in his written submission that 'The date from which alternative income would have been obtained requires a degree of speculation' he submitted that the respondent had provided ample evidence of

vacancies (both part time and full time) for the period from March 2020 to June 2021, numerous of which would have been suitable for him and he would have been considered a strong candidate for them given his experience. We do not agree that on the evidence of vacancies provided they would have been suitable for him or that he would have been considered a strong candidate for them ,given his experience. Even if we are wrong about that ,there is no evidence before us on which we could even speculatively reach conclusions as any dates on which any alternative income which would have been obtained , or ,for that matter, the quantum of any such income.

40 We accept that ,on his own account, the claimant's loss of earnings will have ceased by July 2024.

41 As far as injury to feelings is concerned the act of dismissal was a one off (albeit serious) event. The effects on the claimant were as set out in paragraph 5 above. Happily there is no evidence of long tern effects ;since his dismissal he has been able to retrain ,work in that new area of expertise and has another child. We have concluded that an award of £10000 is appropriate in all the circumstances.

42 In his written submissions about contributory fault (in which he echoed the passage in Harvey set out in paragraph 29 above) Mr Perry also reminded us that we should be conscious of the need to consider whether there is any double punishment for the same conduct under Polkey and under Contributory fault.

43 Mr Perry submitted that the claimant's conduct in relation to non-disability related absences amounted to blameworthy conduct The only non-disability related absence which Mr Preece took into account as part of the claimant's attendance record was that of the 18 September 2018. We have considered whether any reduction should be made to compensation for unfair dismissal or discrimination.

44 We decline to make any reduction to compensation for discrimination, preferring **First Greater Western Ltd v Waiyego** .

45 However , as far as compensation for unfair dismissal is concerned we have concluded that a deduction of 10% should be made to both the basic and compensatory award. We see no good reason why the same reduction should not be made to both awards. We found in paragraph 28 of our liability judgment that the claimant had childcare available to him on 18 September 2018 but chose not to avail himself of it. He could have attended work on that day had he done so. We consider this instance of absence amounts to blameworthy conduct which contributed to his dismissal under section 123 (6) ERA and is such that it is just and equitable to reduce the basic award under section 122(2) ERA.

46 In this case we concluded that the reason for the claimant's dismissal was capability (sickness absence).The AMP procedure to which he was subjected and which culminated in his dismissal was not the respondent's disciplinary procedure. The respondent's letter dated 11 December 2019 requiring him to attend the employment review on 17 December 2019 contained no allegations against the claimant of culpable conduct that might lead to disciplinary action ;the purpose of the employment review was to discuss the claimant's absence(s) from work. At the liability hearing the respondent confirmed it was not contending that

the reason for the claimant's dismissal related to his conduct. Mr Preece took into account the fact that the claimant was absent on 18 September 2019 but not the absence on 13 November 2019.The claimant had unsuccessfully sought to persuade Mr Preece the absence on 18 September 2018 should be disregarded in the application of the AMP on the grounds that the absence in question was really emergency parental leave but Mr Preece did not agree and therefore took it into account as part of his attendance record for the purposes of the AMP procedure. We conclude that the ACAS Code does not apply to the claimant's dismissal because it did not involve culpable conduct (**Holmes**).

47 If we are wrong in our conclusion above then we do not consider that the respondent has unreasonably failed to comply with the ACAS Code. The claimant has submitted that the respondent's failure to follow its own policy (the AMP policy) amounts to a failure to comply with the ACAS Code. The ACAS Code does not contain any provision about compliance with an employer's internal non disciplinary procedures. It was further submitted that Mr Preece had come to his conclusion before the claimant's hearing which breached 'the principles of fairness and transparency.' The reference in the ACAS Code to fairness and transparency is in the context of the significance of developing and using rules and procedures for handling disciplinary and grievance situations in the promotion of fairness and transparency (Paragraph 2). The ACAS Code does not contain any provision about compliance with the principles of fairness and transparency . The claimant has also submitted that by not carrying out a reasonable investigation the respondent failed to 'carry out any necessary investigations ,to establish the facts of the case'(paragraph 4). The preamble in paragraph 4 of the ACAS Code makes it clear that this requirement is in the context of a disciplinary process .The process which culminated in the claimant's dismissal was not disciplinary in nature.

48 As far as interest is concerned we have set out our approach in the schedule attached. Neither party raised the question of taxation or the need for grossing up before the tribunal but the approach we have taken is set out in the schedule on the information provided in the claimant's updated schedule of loss .

Employment Judge Woffenden

Date: 24th October 2023