EMPLOYMENT TRIBUNALS

Claimants: Dr D Harvie (1)
Dr G Lightfoot (2)
Professor S Lilley (3)

Respondent: University of Leicester

Heard at: Leicester Employment Tribunal

On: 19 and 20 June 2024

Before: Employment Judge Welch (sitting alone)

REPRESENTATION:

First and Third Claimants:	Mr A Ohringer, Counsel
Second Claimant:	In person
Respondent:	Ms C Musgrave-Cohen, Counsel

JUDGMENT having been sent to the parties on 28 June 2024 and written reasons having been requested by the first and third claimants in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Judgment on liability dated 1 March 2024 found that all three claimants had been unfairly dismissed.
2. The parties came back before me for a two day remedy hearing. I was provided with an agreed remedy bundle of 365 pages.
3. On the first day of the remedy hearing, I heard evidence from each of the claimants and Professor Ladley for the respondent. Each witness had provided a written

witness statement and gave sworn evidence. In considering remedy, I have taken into account the evidence from the earlier liability hearing, the evidence at this hearing and the submissions from both parties.

4. I was provided with written submissions/ skeleton arguments by the first and third claimants and the respondent. The second claimant adopted the first and third claimants' written submissions. All parties addressed me orally.

5. On the first day of the remedy hearing, I was asked to rule upon the claimants' assertion that the respondent was unable to rely upon Polkey in order to reduce the compensatory award. The claimants contended that as the respondent had failed to plead this in its ET3/ Grounds of Resistance and as it had not specifically been set out in the agreed list of issues, the respondent's opportunity to rely upon it had been lost.

6. Having heard from all parties, I decided that it was entirely appropriate to consider Polkey in relation to the remedy for all of the claimants.

7. Section 123 ERA provides the starting point for the compensatory award for unfair dismissal, and states:

"(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."

8. The agreed list of issues stated on remedy:

"*If the claims, or any of them, succeed, what compensation is it just and equitable for the Tribunal to award to that claimant in all the circumstances?*"

9. The claimants' contention was that the Tribunal had already heard evidence and made findings about the redundancy process such that a consideration of Polkey would require the Tribunal to cover much of the same ground again. This, however, did not prevent hearing arguments on Polkey in the remedy hearing taking into account the evidence already heard.

10. On a brief reading of Boulton and Paul Ltd v Arnold [1994] IRLR 532, relied upon by the claimants, it appeared that this case could be distinguished from the present case. In that case, Polkey had not been raised at the Employment Tribunal stage at all, and the respondent attempted to raise it in the EAT. Counsel for the first and third claimants confirmed that he believed my understanding of that case to be correct.

11. I do not accept that the respondent was seeking to amend its grounds of resistance to include considerations of Polkey. Whilst it is right to say that, as a general rule, the list of issues limits the issues at the substantive hearing to those in the list unless there is a material change in circumstances, I do not accept that the respondent in this case was seeking to amend its response and further I do not consider that I am departing from an agreed list of issues to consider Polkey. I considered that the statement on remedy as set out in the list of issues was sufficient to encompass arguments on Polkey and that it would be unjust not to consider Polkey in this case.

12. I therefore ruled that evidence could be heard in respect of mitigation. I would consider Polkey deductions based upon the evidence already heard at the liability hearing and would consider any submissions made by the parties.

13. It was agreed on the first day of the remedy hearing that I would hear evidence on mitigation and submissions on both mitigation and Polkey deductions, and

give Judgment on that at the start of the second day, so that the parties could then attempt to reach agreement on the amount of the compensatory award. It was agreed that no basic award was payable in any of the claimants' cases.

Judgment on mitigation

14. In order to consider whether the claimant(s) have failed to mitigate their loss, I must ask the following:

    14.1. what steps the claimant(s) should have taken to mitigate their losses;

    14.2. whether it was unreasonable for the claimant(s) to have failed to take any such steps; and

    14.3. if so, the date from which an alternative income would have been obtained, and the amount of that income.

15. The claimants' wishes and views are one of the factors to consider in my analysis. I should not apply too demanding a standard of the claimants. They are not the wrongdoers.

16. Failing to look for any jobs at all is likely to be sufficient to discharge the burden of proof but I still need to consider whether the claimant(s) behaved unreasonably.

17. I had regard to Langstaff J (P) at paragraph 16 of Cooper Contracting Ltd v Lindsey UKEAT/0184/15 as cited by claimants in their submissions:

"(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of Tandem Bars Ltd v Pilloni UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in Pilloni itself, which was to the effect that the Employment Tribunal

should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).

(4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).

(5) What is reasonable or unreasonable is a matter of fact.

(6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding).

(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 a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient."

18. I will deal each claimant in turn.

Dr Harvie (the first claimant)

19. It was clear that Dr Harvie had not registered with agencies but had attempted to obtain alternative employment through his existing contacts with universities. He had also applied for two academic positions at the Universities of York and Leeds. He obtained some casual work with the University of Leeds although this ended in May 2023.

20. The first claimant gave evidence that he had suffered with his health following his dismissal, firstly with fatigue between August 2021 and August 2022 and then long Covid from September 2022 until September 2023. There was no medical evidence to support this, but I accept that his health may have affected his ability to look for and find alternative work, particularly as he continued to work on a casual basis for the University of Leeds during some of that time.

21. The first claimant has undertaken alternative activities which, as yet, have not provided any income, but is hoped will do so in the future.

22. I do not consider that the claimant acted unreasonably by failing to register with agencies, such as Unitemps (used by some universities including the respondent), nor by failing to consider applying to Further Education colleges. Whilst these were open to him, and it may have been reasonable for him to do so, I do not find that he acted unreasonably by failing to do so.

23. However, Dr Harvie did not apply for any alternative roles after July 2021 (when he applied and was not successful with the Universities of Leeds and York). The respondent provided evidence of potential roles which the claimant could have applied for. I consider that the claimant has acted unreasonably in failing to attempt to find alternative work when it was available, as evidenced by the advertisements the respondent provided as a snapshot of a couple of months.

Even accepting that illness may have contributed towards his inability to apply for alternative roles, and further accepting that his caring responsibilities may have affected the geographical areas in which he could have worked, I consider that Dr Harvie should have been able to fully mitigate his losses by 31 March 2024 being approximately 6 months following his ill health improving and 2.5 years after the termination of his employment. I find that he has failed to mitigate his losses by unreasonably failing to apply for vacancies, or contact local universities. Any compensation is therefore limited to 31 March 2024.

Dr Lightfoot (the second claimant)

24. Dr Lightfoot took early retirement in March 2023 and seeks no compensation following this point. This was approximately 18 months after his employment ended. It was clear that Dr Lightfoot undertook some searches on academic websites to attempt to obtain alternative employment although acknowledges in his evidence that he was not serious in looking due to his perceived treatment by the respondent. I initially found that Dr Lightfoot had not unreasonably failed to mitigate his losses on the basis that he had applied for alternative roles prior to his dismissal, which whilst not mitigating his losses, showed that he was trying to obtain alternative employment.

25. The respondent made a reconsideration application under rule 70 that it was in the interests of justice to reconsider the Judgment on mitigation for Dr Lightfoot in light of information that he had disclosed whilst trying to agree the compensatory award. Dr Lightfoot had not hidden this information, and there was no criticism of him in this regard, but it was relevant as to whether he had genuinely attempted to look for alternative employment once he had been made redundant.

26. I heard submissions from both parties and decided to reconsider my Judgment.

27. Dr Lightfoot had been a higher rate tax payer due to having an alternative income from investments of around three million pounds, such that he did not have to work again. I accept that this affected his motivation to look for alternative employment despite this income being consistent both during his employment with the respondent and since his redundancy. I find that Dr Lightfoot acted unreasonably in failing to obtain alternative employment within a year of his dismissal. I consider that had he been motivated to look, and had his income been such to require him to work, he would have found alternative employment prior to his early retirement. Therefore, I limit his compensation to 1 year following his dismissal.

Professor Lilley (the third claimant)

28. Professor Lilley obtained alternative work very quickly, albeit at a lower salary than his role with the respondent. There is no evidence that the claimant has acted unreasonably by continuing in that role and not finding an alternative role with a higher salary since his appointment. His salary was increased by acting up as Head of School for 8 months, although his salary has since reverted to a lower level following this (subject to annual increases). Some of the roles put forward by the respondent for which the claimant could have applied, would not have increased the claimant's salary. I also accept Professor Lilley's evidence that he was restricted in the geographical area he could apply for jobs due to having caring responsibilities for his mother. The third claimant had attempted to obtain alternative employment at Bristol University, but, unfortunately, had been the reserve candidate, and so was ultimately unsuccessful.

29. I therefore consider that the third claimant has not acted unreasonably and therefore there is no reduction for a failure to mitigate in respect of Professor Lilley.

Polkey deductions

30. The decision that the claimants' dismissals were unfair was based upon the failure by the respondent to carry out proper and effective consultation on the selection method to be used prior to it being carried out. Further, that all staff should have been placed at risk of redundancy who were in the ULSB school other than those within the department of Economics, Finance and Accounting and scored after such consultation had been carried out. Additionally, I found that there had not been any proper consultation over the selection criteria used, since the respondent was defensive in any discussions over it.

31. Therefore, as there was no proper consultation either before or after selection on the criteria, it is very difficult to say what, if any difference that consultation would have had. The respondent seeks to say that there was proper consultation on the basket of indicators following its use, but I do not find that to be the case. Therefore, I do not accept that there is 100% chance that the claimants would have been made redundant at the same time as they were made redundant had a fair procedure been followed.

32. The effect of others being placed in the pool makes no difference to my decision on Polkey, since it was clear that the respondent was not seeking to make particular cost reductions or reduce headcount by a specific number such that there was a percentage chance linked to this.

33. There was no proper scoring process adopted. The definitions of CMS/PE may have altered following consultation, although they may have stayed the same, albeit the scoring selection method may well have had greater clarity including whether more recent works were weighted in some way.

34. It was the case that the claimants were able to provide additional information to the respondent to show that their roles were aligned to areas in which the respondent was continuing and were not aligned to CMS/PE but it was not clear how this further information was assessed following its provision.

35. I have to try and construct, and this clearly involves speculation, what I think would have happened had this respondent acted fairly.

36. I am satisfied that there was a genuine redundancy situation and that the respondent was entitled to disinvest itself from areas in which it did not wish to teach/ research in the future. This means that there was clearly a risk that the claimants may have been made redundant in light of this redundancy process. I have to consider what the chances were of the claimants keeping their roles. I have looked at the matrix and the evidence relating to the type of work the claimants undertook and looking at all the circumstances consider that had a fair procedure been followed, there was a 35% chance that Professor Lilley and Dr Lightfoot would have been made redundant and a 50% chance that Dr Harvie would have been made redundant. Therefore, I make these Polkey deductions in respect of their awards.

37. Having given oral Judgment on mitigation and Polkey, the parties were then given the opportunity to try and agree the compensatory awards for each of the claimants.

38. The parties were able to agree on the following amounts to be paid in compensation for unfair dismissal:

    38.1. A compensatory award of £72,487.48 for the first claimant;

    38.2. A compensatory award of £30,521.67 for the second claimant;

    38.3. A compensatory award of £73,625.16 for the third claimant.

Employment Judge Welch
12 July 2024

Judgment sent to the parties on:

……
For the Tribunal:

……

Public access to employment tribunal decisions
Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.