Case Nos. 2414360/2021
2414395/2021
2415292/2021
2401710/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr C Mackay

Respondent: Pyramid Display Materials Ltd

Heard at: Manchester (by CVP) **On:** 27 June 2024

Before: Employment Judge Phil Allen
Mrs A Booth
Mr C Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Ms J Duane, Counsel

JUDGMENT in respect of remedy having been sent to the parties on 3 July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent from 7 July 2008 until 5 November 2021. The claimant was unfairly dismissed as determined in a Liability Judgment sent to the parties on 23 January 2024 following a liability hearing on 23-26 October 2023 and 2-5 January 2024. This was the remedy hearing to determine the appropriate remedy to be awarded as a result.

Issues

2. There were agreed unfair dismissal remedy issues included in the List of Issues provided for the liability hearing and appended to the liability Judgment (as issue 3).

3. Following the Liability Judgment there was a preliminary hearing (case management) in relation to remedy attended by the parties on 20 February 2024. The Case Management Order sent following that hearing also set out the remedy issues to be determined in the light of what was discussed at that hearing.

4. The respondent had been ordered to provide the claimant with a list of the issues to be determined at the remedy hearing by 24 June 2024, which they had done. That List of Issues was provided to the Employment Tribunal. At the start of the remedy hearing the claimant said he was not able to agree the List of Issues but identified no other matters which were required to be determined.

5. In his claim form, the claimant had ticked the box to say that he was seeking compensation only from his unfair dismissal claim. In his Schedule of Loss, he had not made any reference to reinstatement or re-engagement. At the preliminary hearing (case management) to discuss the remedy he was seeking, the claimant had not said that he was seeking reinstatement or re-engagement. In the witness statement prepared for this hearing the claimant had referred to re-engagement. At the start of this hearing, clarity was sought from the claimant as to whether he was now seeking re-engagement as an order from the Employment Tribunal or not. After some discussion, the claimant agreed that he was not seeking reinstatement or re-engagement.

Procedure

6. The claimant represented himself at the remedy hearing. The respondent was represented by Ms Duane of counsel, as it had been at the liability hearing.

7. The hearing was conducted by CVP remote video technology with both parties and the Tribunal all attending by CVP. The remedy hearing was conducted from Manchester Employment Tribunal.

8. As had been ordered, the respondent produced a bundle of documents which contained the documents relevant to the remedy hearing. The numbering of that bundle followed on from the documents provided for the liability hearing. The Tribunal panel also had the liability hearing bundle available. In total the bundle ran to 985 pages. Where a number is referred to in this Judgment, that is a reference to the page number in the bundle.

9. Contained within the bundle was a witness statement provided by the claimant. That witness statement contained the evidence which the claimant wished to give in relation to remedy. The statement also included some evidence which was not relevant to the remedy hearing, and it was agreed with Ms Duane that she did not need to cross examine the claimant about aspects of the statement which were not relevant to remedy.

10. The claimant also provided the Tribunal with a photograph of a bank statement which he said also needed to be considered in the light of something said in the respondent's skeleton argument. The claimant did not provide any other additional documents for the remedy hearing, the documents he had previously provided having been incorporated in the bundle.

11. We heard evidence from the claimant, who was cross examined by the respondent's representative, and we asked (limited) questions. No one gave evidence from the respondent.

12. After the evidence was heard, each of the parties was given the opportunity to make submissions. In advance of the hearing, and as she had been ordered to do, the respondent's counsel had produced a skeleton argument for the remedy hearing. The respondent's counsel made oral submissions expanding upon the skeleton argument. The claimant made oral submissions primarily in response to the arguments put forward by the respondent.

13. The Tribunal adjourned to consider remedy. The parties were then informed both of the remedy judgment and the reasons for the remedy judgment. After informing the parties of the judgment and reasons, the claimant requested written reasons. Accordingly, these written reasons have been provided. The written Judgment itself has previously been provided separately.

Facts

14. Our Liability Judgment contained extensive and lengthy findings of fact which will not be reproduced in this document. We had found that the claimant had been unfairly dismissed. Findings were also made in relation to the respondent's failure to follow the ACAS Code.

15. The claimant was employed by the respondent from 7 July 2008 (he had previously been employed for a short period which was not continuous). His date of birth was 20 July 1979. His employment terminated on 5 November 2021. He entered an Employment Tribunal claim on 4 November 2021. The claimant was paid in lieu of notice.

16. In the letter in which he dismissed the claimant of 4 November 2021 (199), Mr Doherty said the following:

> "*I would stress that this decision has not been taken lightly. I make no judgement call as to where the blame lies in this situation but you have by your numerous and various emails demonstrated that you have lost confidence in us as your employer. This is therefore a mutual and irreparable breakdown of copnfidence"*

17. On 7 February 2022 the claimant commenced new employment with Europoint, another company. The claimant had obtained that employment 18 days after he left the respondent's employ. The claimant was paid a lower salary at Europoint than he had received with the respondent, and he also did not receive commission as he had done with the respondent.

18. At the start of 2023, the claimant commenced a period of absence for ill health reasons. Limited information was available about that absence and the reasons for it. The claimant did not return to employment with Europoint after he commenced absence. Europoint paid the claimant statutory sick pay only for the period of his absence.

19. The claimant's employment with Europoint terminated by mutual agreement with effect from 5 April 2023. The claimant was paid notice pay and holiday. The

company also made contributions to the pensions scheme. A letter confirming these details was provided (729).

20. It was the claimant's evidence that he was (as at the date of the remedy hearing) currently not fit enough to work and indeed had not been since his employment with Europoint ended. It was his evidence that he will remain unfit to work until July 2026. The claimant was in receipt of PIP which had been authorised and backdated to after the end of his employment with Europoint. The claimant had received no other benefits. The claimant confirmed that the PIP was payable irrespective of whether or not he was in employment.

The Law

21. Section 119 of the Employment Rights Act 1996 says:

> *(1) … 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 …*

22. Section 122 contains the provisions which apply to reductions to the basic award. There is no provision which applies **Polkey** or reflects the principles set out in that case. Section 122(2) says:

> *Where the Tribunal considers that any conduct of the claimant 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 the amount accordingly*

23. Section 123 Employment Rights Act 1996 provides (so far as relevant for present purposes):

> *"(1) Subject to the provisions of this section … 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. …*

> *(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 to damages recoverable under the common law …*
>
> *(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 any compensatory award by such proportion as it considers just and equitable having regard to that finding…*"

24. With regard to mitigation, the burden of proof is on the wrongdoer; a claimant does not have to prove they have mitigated their loss. What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable. We are not to apply too demanding a standard.

25. In her submissions, the respondent's representative set out some detail about the law to be applied regarding loss. Amongst others, she relied upon **Mabey Plant Hire Ltd v Richens**, **Devine v Designer Flowers Wholesale Florist Sundries Ltd** 1993 IRLR 517, **GAB Robins (UK) Ltd v Triggs** [2008] EWCA Civ 17 and **Courtaulds Northern Spinning Ltd v Moosa** 1984 ICR 218. She relied upon and quoted from **Gardiner-Hill v Roland Berger Tecnics Ltd** 1082 IRLR 498 regarding mitigation. She quoted from **Norton Tool v Tewson** [1972] ICR 501 that the compensatory award was "*to compensate, and compensate fully, but not to award a bonus*". We took account of what she said.

26. In **Polkey v AE Dayton Services Ltd** [1987] IRLR 503 the House of Lords held that the fact that an employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee *may* have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction, the Tribunal may have to speculate on uncertainties to a significant degree. The respondent's representative in her submissions relied upon **Lambe v 186K Ltd** 2005 ICR 307, **Wilkinson v Driver and Vehicle Standards Agency** [2022] EAT 23, and also quoted the following passage from the Judgment in the leading authority of **Software 2000 Ltd v Andrews** [2007] IRLR 568 which we particularly took into account:

> "*The following principles emerge from these cases: (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the*

evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future). (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

27. We have set out the statutory words which apply to contributory fault for the basic award (section 122(2)) and the compensatory award (section 123(6)). As the respondent's representative highlighted, the contributory conduct does not have to be the principal reason for dismissal as long as (for section 123(6)) it was one of the reasons (**Robert Whiting Designs Ltd v Lamb** [1978] ICR 89). The respondent's representative also highlighted what was found in **Carmelli Bakeries Ltd v Benali** [2013] UKEAT 0616/12, **Whitehead v Robertson Partnership** [2002] UKEAT/0331/01, **Wilkinson v DVSA**, and **Jagex Ltd v McCambridge** UKEAT/0041/19.

28. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that if in certain proceedings (including a claim for unfair dismissal) the claim relates to a matter to which the relevant code of practice applies and the respondent has failed to comply with the code and the failure was unreasonable, the Tribunal may (where it considers it just and equitable to do so) increase any award by no more than 25%. Those provisions apply to the ACAS code of practice on disciplinary and grievance procedures.

29. Section 1 of the Employment Rights Act 1996 sets out the obligation on an employer to provide a statement of terms and conditions of employment and what that statement must include. Section 38 of the Employment Act 2002 applies to a failure to give a statement of terms and conditions of employment. What is said at section 38(3) (with our emphasis added) is:

If in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) ***when the proceedings were begun*** *the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 …*

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase by the higher amount instead"

Conclusions

30. The first issue that we needed to address was the basic award. The claimant had 13 years' service with the respondent. He had one complete year of service aged over 41. The appropriate multiplier for the basic award was accordingly 13½.

31. We needed to consider the amount of a week's pay to be used in the calculation. The maximum level of a week's pay is based upon the date of dismissal and the maximum that applied at that time. The relevant week's pay was therefore £544, something which the claimant accepted.

32. As a result, the basic award was calculated as 13½ x £544 which resulted in an award of £7,344.

33. Section 119 of the Employment Rights Act 1996 is very clear that it is full years that are taken into account for the calculation, not part years. That meant that no part of the additional part year over the 13 complete years was used in the calculation.

34. There is no power or ability to reduce the basic award applying the principles of **Polkey**.

35. The basic award could be reduced under section 122(2) of the Employment Rights Act 1996. We did not find that the conduct of the claimant before dismissal meant that it was just and equitable to reduce the basic award. We did not find that there was any such conduct on the part of the claimant. Within these written reasons we will return to contributory fault when addressing the compensatory award (and that explanation should be read as also applying to the relevant test for the basic award). We did not find any fault such as would result in a reduction of the basic award in this case.

36. As a result, the basic award awarded was **£7,344**.

37. The next issue we needed to determine was the appropriate compensatory award. That is the award which reflected the financial loss which the claimant suffered as a result of the dismissal. The relevant award should be determined under section 123(1) of the Employment Rights Act 1996 and should be an award that is just and equitable in all the circumstances having regard to the loss sustained by the claimant.

38. The respondent argued that the claimant failed to mitigate his loss when he accepted employment at Europoint, 18 days after his dismissal by the respondent, for lower pay than he had received at the respondent. That was effectively issues 3.2 and 3.3 (with a bit of 3.1). We did not accept that argument, indeed we utterly rejected it. We accepted that the claimant took appropriate steps to mitigate his loss

by obtaining alternative employment in the same industry so quickly. We found that he did the best he could at the time.

39. The next question for us was for what period should the claimant be compensated or what period should be reflected in the compensatory award? The claimant had suffered from ill health dating back to 2014, including depression and, more recently, OCD. We set out the history in paragraph 178 of the Liability Judgment. From the new employment which the claimant commenced on 7 February 2022, the claimant had had a period of long-term ill health absence from the start of 2023 from which he did not return. The claimant's evidence before us was that he was not fit to work at the time of the remedy hearing and was not likely to be fit to work until July 2026. We found that the claimant would have ceased to be able to remain in paid active employment from the start of 2023, even had he not been unfairly dismissed, based upon what in fact occurred with his new employer. There was no genuine evidence before us that the deterioration in the claimant's health was as a result of his dismissal by the respondent (and we would emphasise "dismissal" and not any other actions of the respondent). We noted what the claimant said about coping strategies with the respondent, but did not find that any such strategies would have meant that he was able to remain in employment with the respondent (had he not been dismissed), where in fact he has been unable to remain in employment with Europoint and was at the date of the remedy hearing unable to work at all.

40. As a result, we found that the losses arising from the dismissal were primarily the difference between the claimant's earnings with Europoint up to the start of January 2023 and what his earnings would have been with the respondent had he remained in employment for that period. We needed to calculate net loss, which made the calculation considerably more difficult, many of the figures with which we were provided having been for gross loss.

41. In her submissions, the respondent's representative accepted that the net loss over that period was **£6,409**. The claimant disputed that figure and provided a different figure of loss resulting from a longer period. We were unable to identify or calculate a figure for the claimant's loss which was higher than that accepted by the respondent, based upon the information provided or the documents provided. As a result, we determined that the appropriate starting figure for the calculation was the one put forward by the respondent.

42. We then turned to the issue of pay increases that the claimant might have received from the respondent had he remained employed. A document provided by the respondent (1,002) recorded that a 5% cost of living increase was paid to employees in April 2022 and a 3% increase in October 2022. As that was a document produced by the respondent, we relied upon it. We therefore needed to calculate an additional figure to be paid to the claimant to reflect those losses, as the starting figure described did not take account of pay increases. This inevitably needed to be an imprecise calculation. We based our calculations on the gross basic salary figure taken from the last payslip which reflected the claimant's normal earnings with the respondent. We applied an initial 5% increase and then a further 3% increase from October. We then applied a reduction to that figure of 40% to

reflect a broad assessment of potential tax. That calculation resulted in an additional loss figure of **£441**, in addition to the starting loss figure, to reflect the lost pay increases.

43. There was also an issue regarding pension loss. The respondent's representative acknowledged in submissions that there were no pension contributions made for the first three months of employment by Europoint. Based upon the claimant's payslip with the respondent of 31 October 2021, the monthly employer pension contributions made by the respondent were £150.98. That therefore resulted in a loss over the three-month period of £452.94. In her submissions, the respondent's representative also accepted that there was an £11 difference per month thereafter between the employer pension contributions made by the respondent and those made by Europoint. We did not accept her submission that the contributions made after termination of employment with Europoint (or at about that time) should be taken into account to offset that difference. Accordingly, for the eight relevant months there was a loss of £88. As a result, we included in the calculation of the compensatory award a figure for total loss of employer pension contributions of **£540.94**.

44. We then considered the issue of sick pay. Europoint paid SSP only to the claimant during his period of sickness absence. The claimant's contract with the respondent also said that SSP only was paid. The respondent's submission was that SSP was paid by the respondent unless it exercised its discretion to pay full salary. In practice, the respondent had exercised that discretion for the claimant in the past. We accepted the respondent's submission that the respondent would have paid SSP at some point where there was an extended period of absence but found that initially they would have paid the claimant full pay. As a result, we determined that the claimant should be awarded one month's difference of the full pay that the respondent would have paid (including car allowance and related benefits) less the SSP that he in fact received from Europoint. Taking a broad-brush approach to this assessment, the lost total net salary was £3,000. We deducted the £400 SSP that Europoint in fact paid, resulting in a net loss of **£2,600** which we included in the compensatory awarded.

45. The claimant argued that he should receive additional compensation for the loss of a mobile phone. The one document we were shown which described the respondent's contractual terms, said that the mobile phone was provided for business use only. The claimant relied upon a document that we were not provided with. We could not take account of a document that we did not see and therefore we made no additional award for the loss of mobile phone as we relied upon the document provided to us.

46. We also made no award for loss incurred after the end of January 2023. We understood the claimant's submissions about him being out of work until 2026 but did not find that those losses were as a result of his dismissal but were rather as a result of his ill-health, something that we have found would, on the balance of probabilities, have meant that he ceased undertaking active employment in any event (even had he not been dismissed by the respondent).

47. The parties had agreed that a figure for loss of statutory rights should be included in the compensatory award of **£500**.

48. Based upon all of those figures, the total compensatory award (before adjustments) would be **£10,490.94** (£6,409+£441+£540.94+£2,600+£500).

49. We then considered the respondent's argument that the amount awarded should be reduced based upon the principles outlined in the case of **Polkey**, that is based upon the fact that the claimant would have been dismissed in any event. We took account of what was said in the leading authority of **Software 2000 Limited** as set out in the respondent's submissions. However, in this case and where we had limited the claimant's losses as a result of his ill-health to those incurred up to the end of January 2023, we did not find that it was appropriate to reduce the compensatory award further applying the principles of **Polkey**. The decision that we made and have set out in these written reasons in terms of the period of loss, had already taken into account the likelihood that the claimant's employment would have ended by reason of sickness in any event. We did not find that the claimant would inevitably have been dismissed by the respondent as submitted. In other circumstances, it might have been appropriate to have applied a percentage reduction if the claimant was being awarded a long period of potential loss, but for the reasons we have already explained above we have already reflected in the loss calculation the likelihood that the claimant's employment would have ended with the respondent due to illness (and that calculation already reflected the possibility of a termination due to breakdown in relations which occurred at the same time).

50. We next considered the claimant's contention that the award should be increased as a result of the respondent's failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. We had already found that the respondent had failed to follow the ACAS code, as they did not give the claimant a right of appeal. Our findings in relation to that were set out in paragraph 170 of our Liability Judgment. We found that failure was unreasonable. We also decided that, as a result, the compensatory award should be increased applying section 207A of the Trade Union and Labour Relations (Consolidation) Act. We did not accept the respondent's submission that an appeal would inevitably have made no difference. It is the very nature of an appeal, that a different and more senior (or equally senior) person considering someone's appeal may make a difference, and in any event not to provide an appeal breached the ACAS Code.

51. Under the statutory provisions we were able to increase the compensatory award by anything up to 25%. We found that appeals are a fundamental part of the process and that this breach was a fundamental failure to apply the ACAS Code. We did take account of the fact that a meeting was held before dismissal and therefore, to an extent, the ACAS Code was initially followed, however we would highlight our findings at paragraph 169(b) of the liability decision in which we explained the failings in the process followed even in that respect. We therefore needed to consider the percentage increase that we considered just and equitable. We determined that it was just and equitable to increase the award by 20% taking account of the respondent's unreasonable failure to follow the ACAS Code.

52. As a result of applying that 20% uplift to the compensatory award, the award was uplifted by **£2,098.19**. As a result, including that uplift, the compensatory award made was **£12,589.13**.

53. We considered the respondent's submissions as to contributory fault. We did not find that there was any blameworthy conduct by the claimant whatsoever prior to his dismissal. In practice, we addressed these issues in more detail in our liability decision, and we applied what we found in that decision when we considered the relevant legal test for contributory fault. The claimant was able to raise grievances as all employees can, there were no questions about his work performance, and we did not find that the claimant contributed to his dismissal. We also noted that when dismissing the claimant, in his letter, Mr Doherty himself expressly stated that he made no judgement call about where the blame lay for the situation. That is, the person who made the decision to dismiss at the respondent did not himself ascribe blame to the claimant at the time. We found that supported our decision. In addition, even had we found that the conduct of the claimant before the dismissal had contributed to it, we would not have found that it would have been just and equitable in the circumstances of this dismissal to reduce the award as a result.

54. The final issue which we needed to determine was whether there had been a failure to provide the claimant with a statement of terms and conditions of employment. We accepted the claimant's argument that he was not provided with a statement of terms and conditions until he was suspended in or around August 2021. However, the claimant was provided with a statement before he was dismissed and (more importantly) before his claim was entered at the Employment Tribunal. The relevant date for considering whether there has been a failure to provide a statement of terms and conditions, is the date when the claim is entered. On the date the claim was entered, the claimant had been provided with a statement of terms and conditions. As a result, no increase to any award was made.

55. Whilst the issue of the statutory cap had been raised by the parties, we did not need to consider or apply that in this case, as the statutory cap far exceeded the amount that we awarded.

Summary

56. In summary and as explained above, we awarded the claimant a basic award of £7,344 and a compensatory award of £12,589.13. That meant that the claimant's overall total award was **£19,933.13**. The compensatory award figure included the uplift for the respondent's unreasonable failure to follow the ACAS Code (applied at 20%). The only benefits paid to the claimant were PIP and it was common ground that the PIP did not need to be taken into account for these losses, nor did it result in the relevant rules which apply to recoupment needing to be applied.

Employment Judge Phil Allen
Date: 5 August 2024

REASONS SENT TO THE PARTIES ON
8 August 2024

FOR THE TRIBUNAL OFFICE

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