



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Billingham

**Respondent:** EMKA UK Limited

**HELD AT:** Birmingham (via CVP)

**ON:** 19<sup>th</sup> September 2024

**BEFORE:** Employment Judge Anderson

## REPRESENTATION:

**Claimant:** Mr Ross (Counsel)

**Respondent:** Mr Rozycki (Counsel)

**JUDGMENT** having been sent to the parties on 20<sup>th</sup> September 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 – REMEDY HEARING

### Introduction

1. These are my written reasons in respect of the remedy hearing that took place on the 19<sup>th</sup> September 2024.
2. Previously, in my reserved Judgment, I found that the Claimant had been unfairly and wrongfully dismissed. I found that there was contributory fault which would reduce the basic and compensatory awards at a level of 25%. In respect of Polkey, I declined to make a percentage reduction and instead set a period of loss.

3. At the conclusion of my Reserved Judgment on liability, I proposed the following list of issues:
  - a. What is the Claimant entitled to by way of basic award?
  - b. What are the Claimant's losses?
  - c. Mitigation – is the Respondent able to prove that the Claimant has failed to take reasonable steps to mitigate his loss? If yes, by what date could the Claimant acting reasonably have obtained employment?
  - d. ACAS Code – Did the Respondent unreasonably fail to follow the ACAS Code? If so, by what percentage is any award to be increased?
  - e. Wrongful dismissal – what sum is payable by way of damages for wrongful dismissal? Does the Income Tax (Earnings and Pensions Act) 2003 as amended require that this calculation is performed first?
  - f. Is it appropriate to make an award of two to four weeks pay under s.38 of the Employment Rights Act 1996?
  - g. To what extent must any awards be adjusted to cover taxation? If so, by how much?
  - h. In what order are the calculations applied?
  - i. Application of the statutory caps (if appropriate)
4. I directed that if either party wished to alter the above list then they could do so provided they gave reasonable notice to the other side. I was informed at the outset today that neither party disagreed with the above list.
5. The vast majority of points were already agreed between the parties or were arrived at by agreement during the course of the hearing.
6. It was previously agreed that reinstatement or re-engagement was not sought.
7. .At the outset of the hearing today, it was accepted by the Respondent that it was not suggesting that the Claimant had failed to mitigate his losses. The Respondent also accepted the Claimant's position that there had been an unreasonable failure to follow the ACAS Code and that the appropriate level of uplift was 25%.
8. Some points of disagreement arose during the hearing which required a decision from me. These were as follows:
  - a. In light of the authority of Burlo & Langley v Carter [2007] ICR 390, the extent to which, when determining compensation under s.123 Employment Rights Act 1996, the Tribunal takes into account the income the Claimant has received by way of mitigation during the period of his notice.
  - b. Whether, when looking at the principle of totality, how the uplift of 25% would be applied to the wrongful dismissal award, whether prior to or post grossing up.

9. Whilst I determined the above points during the course of the hearing, for practical purposes it would appear that these points had little or no effect on the overall award.
  
10. The main complicating factor before me today was that notwithstanding my raising tax in the list of issues at the end of the last hearing and also the significance of the tax issue to the parties at the last hearing given the reason why there was no mutual termination, there was uncertainty regarding the tax position. It was apparent that neither party had correctly addressed the approach to taxation for the purposes of today's hearing in advance of the hearing. I deal with this further in the facts section and calculations below.

### **Facts**

11. Neither party sought to call any additional oral evidence beyond that which was already heard at the liability hearing. Neither party took issue with the other party not calling any additional oral evidence. The Claimant's Schedule of Loss detailed his earnings in his new employment, which were not the subject of challenge. Some additional documents relating to wages were in the remedy bundle.
  
12. The liability Judgment was a Reserved Judgment and full reasons were provided. Therefore, these facts are set out in order to enable the reader to understand the conclusions reached in this Judgment.
  
13. The Claimant commenced employment on 1<sup>st</sup> November 1991. The effective date of termination was found to be the 31<sup>st</sup> October 2022. The Claimant had 30 years of continuous employment. The Claimant was born in June 1964 and was 58 years old at the date of termination.
  
14. The Claimant's contract of employment contained a 9 month notice clause.
  
15. With the Respondent, the Claimant earned £1092.85 per week net. This was a slight recalculation from the figure contained within the schedule of loss and was based upon the figures contained within the bundle.
  
16. During the course of the hearing today, both parties were given breaks in which to perform recalculations. Both parties had calculated the position regarding pension differently. After lunch, I asked Counsel for the Claimant to go through the revised pension figures, which results in the calculation below.
  
17. It is currently the 2024/2025 tax year. Given it is September, it is presumed that any Judgment will be paid in this tax year. The Claimant through his alternative employment in mitigation will have used his personal allowance and 20% allowance. Any tax payable will be at 40% plus National Insurance.

## The Law

### General

18. I will deal briefly with the basic provisions and cover in more detail points of contention.
19. A Basic Award is calculated in accordance with s.119 Employment Rights Act 1996.
20. A compensatory award is calculated on the basis provided by s.123 Employment Rights Act 1996. Compensation is on a just and equitable basis taking into account all of the circumstances having regard to the loss sustained by the Claimant.
21. In respect of wrongful dismissal, losses are assessed by way of damages and are subject to a total cap of £25,000.

### The Narrow Norton Tool Principle

22. In Burlo & Langley v Carter [2007] ICR 390 the Court of Appeal refused to depart from a longstanding principle contained within Norton Tool v Tewson [1972] ICR 501 that when assessing damages for dismissal, it was good industrial relations practice for a payment in lieu of notice to be made without deductions made for any earnings that the employee may have in that period.
23. Mr Rozycki having had time to consider the point referred me to the decision of Babcock FATA Ltd v Addison [1987] IRLR 173 which was considered in detail as part of the Burlo decision. In particular, I was taken to para 21, which expressly referenced circumstances, including the length of the notice required whereby it could be shown that a payment of less than the wages due would not offend industrial good practice.
24. In the present case, the Claimant had an exceptionally long period of notice, namely 9 months. He had also taken steps to mitigate his loss.
25. This was a point on which the parties made competing submissions. This was a point about the application of a principle. I was persuaded that the Claimant's exceptionally long notice period, if applied alongside the Norton Tool principle in full could result in circumstances as envisaged in para 22 of Babcock. I also took the view that such an outcome would be disproportionate and not in accordance with the just and equitable principles contained within s.123 Employment Rights Act 1996.
26. I therefore limited the application of the Norton Tool principle to the first 12 weeks of the Claimant's losses. This is a perfectly normal notice period for a long serving employee. I saw why no reason in principle whereby if I accepted

that a 9 month period resulted in an exception to the principle, it was mandatory for me to disapply the entire notice period. That would place an employee with a longer notice period in a worse position than an employee with a shorter notice period. By choosing a period of 12 weeks, the principle as upheld in Burlo was still capable of application.

### **The Relationship Between the ACAS Uplift and the Grossing up of Wrongful Dismissal Damages**

27. Given the mandatory requirement (contained in the amended Income Tax (Earnings and Pensions) Act 2003 for Wrongful Dismissal awards to be on a gross basis, the parties were in dispute as to whether or not the ACAS uplift of 25% should be applied to damages on a gross or net basis.

28. I heard submissions from both parties on this point. I determined this point in favour of the Respondent. The 25% should be applied to the net figure and then grossed up for tax purposes.

29. I decided this for the following reasons:

- a. When considering compensation under s.123 ERA 1996, the grossing up only takes place after the ACAS uplift has been applied. This is consistent with that approach.
- b. The Claimant will be taxed by HMRC on the gross sum. It is that figure to which the tax regime will be applied. (c.f. Hall v Durham County Council (2015) UKEAT/0256/14/MC para 71 onwards per Langstaff P)
- c. Even though the parties had agreed that the correct uplift was that of 25%, I still had to have regard to the principle of totality. In my view, uplifting a gross sum in this way results in disproportionate figures.

### **Conclusions & Calculations**

#### **Basic Award**

30. The Calculation of the basic award was agreed between the parties at £12,205.14. This is based on the following calculation.

31. A weeks pay is capped at £571.00. The calculation therefore is as follows:

- a. 3 years x 1 week x 571 = £1713.00
- b. 17 years x 1.5 weeks x 571 = £14,560.50
- c. £1713.00 plus £14,560.50 less 25% contributory fault of £4068.37  
=£12,205.14

**Compensatory Award**

32. The first period of loss to calculate is the first twelve weeks, based upon the restricted application of the narrow Norton Tool principle that I have described above. Therefore loss of earnings for a period of 12 weeks from the effective date of termination to the 23<sup>rd</sup> January 2023 results in a figure of £13,114.20.
33. The next period of loss, less mitigation sums earned by the Claimant to the 31<sup>st</sup> July 2023. This is the date by which losses cease in the liability Judgment. This results in a figure of £2216.88
34. There is then pension loss to the 23<sup>rd</sup> January 2023 based upon £178.85 x 12 = £2146.15.
35. There is then pension loss to the 31<sup>st</sup> July 2023 based upon £178.85 x 24 = £4292.31 which is then reduced by mitigation of £613.20 = £3679.11
36. Loss of statutory rights was awarded in the sum of £500.00
37. The Claimant's losses were therefore £21,656.34.
38. This was uplifted by 25% to reflect the failure to follow the ACAS Code, resulting in a sum of £27,070.43.
39. This was then reduced by 25% to reflect the previous finding on contribution, resulting in a sum of £20,302.82.
40. It was agreed that the Respondent was in breach of its obligation to provide a statement of particulars in compliance with s.1 Employment Rights Act 1996. An award under s.38 Employment Act 2002. There were no exceptional circumstances within the meaning of s.38(5). The Claimant sought two weeks of pay and I award this sum. I have included this under the heading of 'compensatory award' even though it is a separate award because it does fall to be considered as part of the statutory cap. This award is made on a gross basis and is subject to the cap on a weeks pay. Therefore two weeks gross pay capped is calculated as £571 x 2 = £1142.00
41. This results in a sum of £21,444.82.
42. The Claimant has a tax free allowance of £30,000.00 provided for in the Income Tax (Earnings and Pensions) Act 2003. The basic award added to the net compensatory award (£12,205.14 plus £21,444.82 = £33,649.95) means that £3,649.95 of the compensatory award must be grossed up for tax purposes.
43. This produces a final compensatory award of £24,420.68.

44. Therefore the compensatory award was calculated as £24,420.68

45. The recoupment regulations do not apply.

### **Wrongful Dismissal**

46. Damages in respect of wrongful dismissal are calculated on a gross basis. The Claimant must account to the revenue in respect of the tax payable. This was following amendments to the Income Tax (Earnings and Pensions) Act 2003 in respect of which parties which required a prioritisation of notice periods and their calculation on a gross basis as parties were failing to do so and the revenue was not receiving sums that it considered were properly owed.

47. The full notice period on a net calculation is £39342.60. Mitigation has occurred over a 27 week period at a rate of £1000.48 p/w net (pay plus pension) reducing the figure by £27012.96 resulting in a figure of £12,329.64.

48. When the ACAS uplift is applied of 25% this results in a figure of £15,412.05. When this figure is grossed up, by 40% and before any National Insurance contributions, the cap is exceeded.

49. The Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994 provides an absolute cap of £25,000 in respect of a claim for breach of contract. The Tribunal does not have jurisdiction to make a higher award.

50. Any additional calculations are otiose. It is the £25,000 figure that the Claimant will be taxed on.

51. Therefore, damages were calculated at the cap of £25,000.

### **Postscript**

52. When providing the above reasons, it became apparent that in respect of wrongful dismissal, there is a risk that insufficient credit has been given for the sums received in respect of the compensatory award. I say a risk, because the Claimant's schedule of loss in the conclusion section has gross notice pay losses of £20,191.29 and that is before any ACAS uplift. At the same time, the Counter Schedule has a nil figure for wrongful dismissal, which does not acknowledge that a reduction of 25% for contribution will apply to the compensatory award that would not apply to the damages for being wrongfully dismissed.

53. I considered reconsidering my Judgment of my own volition. However, I did not consider that the potential outcome of that reconsideration was only one possible answer. I was also concerned that given the two stark positions in the competing schedules, it was better for the parties to have a say in resolving the point.

54. In respect of wrongful dismissal, there is no deduction for contributory fault. Therefore, the Claimant would appear to be entitled to some damages in respect of the fact that the compensatory award will undercompensate his losses in his notice period. I am also open to any other argument as to what the notice period would need to cover.

55. I am also clear that this figure would need to be uplifted by 25% in respect of the ACAS Code breach and then grossed up.

56. I therefore invite the parties to:

- a. Seek to resolve the matter between themselves. This would be the most simple and cost-effective way of resolving the point.
- b. Alternatively, apply for reconsideration. Any application for reconsideration must include the specific calculation that I am being asked to apply. Whilst the Rules do not oblige the other party to reply to such an application, this is a case in which I would be assisted in having both parties positions set out clearly. The application will then be considered under Rule 72(1). If the threshold for reconsideration is met, I am required to hold a further hearing unless both parties consent to the matter being dealt with on paper. Given that this is a point of mathematics, I would hope that it could be dealt with on paper, but each party must take a view. The rules provide for a hearing and if the criteria is met, a party is entitled to a hearing.

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**Signed by: Employment Judge Anderson**  
**Signed on: 25<sup>th</sup> October 2024**