



EMPLOYMENT TRIBUNALS

Claimant: Mr Samuel Francis
Respondent: Microtill Limited
Heard at: East London Hearing Centre
On: 13 and 14 February 2025
Reserved decision (in chambers) on Remedy only on 13 March 2025
Before: Employment Judge B Elgot

Representation

Claimant: In person
Respondent: Ms L Ware, Sales Manager

The Employment Judge gave judgment as follows:-

REMEDY JUDGMENT

- 1. The Respondent conceded on 14 February 2025 that the Claimant was unfairly dismissed without notice on 14 May 2024. A Liability Judgment was issued on 14 February 2025, sent to the parties on 26 February 2025.
- 2. The parties' evidence on remedy was heard on 14 February and the decision on remedy was reserved.
- 3. The compensation to which the Claimant is entitled is as follows:-
- 4. **Basic award £ 2280**

The Claimant was aged 23 at the date of dismissal. He had been employed under a contract of employment for 3 complete years. His net pay is agreed between the parties to be £589 per week which is a gross weekly pay of £760 using a standard on-line calculator. He worked 4 days per week. The multiplier is 3. The basic award is calculated on gross weekly pay.

There is no reduction made by reference to the Claimant's conduct before dismissal under section 122 Employment Rights Act 1996 ('the 1996 Act')

5. **Compensatory award**

The net pay per week is agreed as £589

The Claimant had the unlimited use of a company car and fuel which the parties agree was worth £45.12 per week.

The Claimant had the benefit of employer's contributions to a workplace pension which, on an average taken from the payslips on pp78-79 of the bundle, amounts to £17.40 per week.

Total net pay and benefits is £ 651.52 per week

Immediate loss of wages

The number of weeks between the date of dismissal on 14 May 2024 and the date of assessment which is 13 March 2025 is 43 weeks x 651.52 = £28,015.36

Less earnings in alternative employment /business activity ((assessed over the four days a week he was employed by the Respondent and not working in his own business) which the Claimant could have obtained if he had reasonably mitigated his losses is 17 weeks x £228.80 =£3889.60

Sub-total £24,125.76

Less Earnings in the relevant period from vehicle sales work and mystery shops £400

Sub-total £23,725.76

Less a percentage Polkey reduction of 30% giving a total for immediate loss of wages **£16,608.03**

Future loss of wages

Future loss for a further 13 weeks at £ 422.72 per week is awarded. £5,495.36

Add for loss of statutory employment rights £ 500

Sub total £ 5995.36

Less a percentage Polkey reduction of 30 % of this element

Total for future loss of wages is **£ 4196.75**

The total compensatory award is **£ 20,804.78**

It is uplifted by 22 % under section 124A of the 1996 Act (unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code'))

The uplifted compensatory award is £4577.05 + £20,804.78

The total is £25,381.83

There is no reduction of the compensatory award under section 124A for any failure by the Claimant to unreasonably comply with the ACAS Code by pursuing an appeal against dismissal.

There is no reduction of the compensatory award by reference to contributory fault of the Claimant under section 123 of the 1996 Act.

6. **The grand total of compensation payable by the Respondent to the Claimant within 28 days is £27,661.83 (£2280 + £ 25,381.83)**

REASONS

1. The Claimant has succeeded in his claim of unfair dismissal upon withdrawal of the Response / Defence of the Respondent. He was dismissed without notice on 14 May 2024 for misconduct. The letter of dismissal is at page 109 of the main agreed bundle consisting of 171 pages.
2. I am certain that now that the Claimant has this judgment in his favour which confirms that he was unfairly dismissed he will be in a significantly better position to find new permanent work at the same level of earnings which he previously had. Therefore, his future loss of earnings is restricted to a further period of 13 weeks (three months) at the amount of £ 422.72 per week as calculated below.
3. The Claimant confirms that he makes no claim for a failure by the Respondent to provide a written statement of employment particulars.
4. The Respondent concedes that it failed to carry out any specific formal investigation into the allegations of misconduct made against the Claimant and did not properly inform him of the detail of the allegations he faced so that he did not know the case he had to answer. There was no disciplinary investigation and at the short disciplinary hearing held on 14 May 2024 the Claimant was unable to arrange any support or representation and was simply handed a pre-prepared letter of dismissal. I am therefore satisfied that an uplift of 22% in respect of the Respondent's unreasonable failure to comply with the ACAS Code is appropriate. The maximum uplift is 25%. However, I am satisfied that the Respondent offered an appeal against dismissal and in this respect complied with the ACAS Code; this was a verbal offer made by Mr Alan Wisdom, Director, as he states in paragraph 31 of his witness statement.

5. The Claimant did not take up any offer of an appeal and I consider that it was reasonable of him to decline to take this step in all the circumstances of an apparently predetermined and summary dismissal which he experienced as a shock and which destroyed any confidence he had of receiving an independent or impartial appeal. I make no reduction in the award of compensation to him for his failure to appeal.
6. Documents and Witnesses
 - 6.1 There is an agreed main bundle of 171 pages, an additional bundle of 35 pages (the 'Subsequent Bundle') and some extra documents disclosed by the Respondent (7 pages) in a supplemental bundle, all in digital format. In accordance with the usual practice of the Tribunal I have read only those documents to which my attention has been specifically drawn by the parties and the witnesses.
 - 6.2 The Claimant gave evidence on his own behalf on remedy and the Respondent's witness on liability and remedy was Ms Lauren Ware, Sales Manager. The Respondent's concession on liability meant that it was not necessary to hear from any of the other witnesses called by either party.
 - 6.3 Both parties have made helpful written submissions on remedy. There is no intended criticism of either party, since neither has legal representation, however I must make it clear that the additional evidence attached to those submissions has not been considered by me. The written and oral evidence produced up to the end of this hearing on 14 February 2025 at 5pm is all that I have taken into account. The purpose of submissions is not to produce additional evidence but to summarise the main factual points arising from the evidence already given and to provide legal argument if the parties wish to.
 - 6.4 I have seen the Claimant's Schedule of Loss and a Counter Schedule produced by the Respondent.
7. The Claimant worked as a Sales Business Development Manager for the Respondent four days per week. His line manager was Ms Ware. His salary and benefits are as set out above in the Judgment.
8. He also runs an independent auction house trading platform, in partnership with Ms Chloe Lloyd, through a company named Francis Lloyd Trading Ltd (FLT) and he spends one day per week in this business activity which he says mostly involves buying and selling, on eBay and other platforms, redundant, used, damaged and incomplete products at low prices. The Respondent knew about this business and permitted it. Indeed, Mr Wisdom actively discussed his interests in the auction business with Mr Francis and even asked him to procure a couple of items at a good price if they could be found, e.g. a digital camera.
9. The Claimant is certain that he and Ms Lloyd make insufficient profit from this business to pay themselves any salary or income. The money in the FLT account is retained as capital in order to buy new stock for sale. He said in evidence that there is insufficient business available for FLT to make it feasible for him to increase his

work in this area above and beyond one day per week (plus some evenings and weekends) and make a salary for himself and his partner which is sufficient to live on. I find this to be a credible situation whilst the business is growing and accept the Claimant's evidence that it may be up to five years before it is clear that FLT is proven to be a successful full time enterprise.

10. The Claimant has no technical or professional qualifications and has not engaged in higher education; he has three A levels. His only work experience has been at Microtill in sales, business development and IT programming. He has also assisted on the technical side in installation and cabling jobs for the Respondent which provides EPOS till and payment systems and solutions to a wide range of businesses.
11. I understand that the Respondent is prepared to give him a factual reference without supplementary comment and this will be useful to him in his job search.
12. Mitigation of Loss
 - 12.1 The Claimant's evidence is that he has applied through the Indeed website for 89 jobs as at 5 November 2024 and that number is now 147. There is a note of several and varied applications and rejections at pages 113, 126 and 127 of the bundle; he is applying for a wide range of opportunities. He has also approached potential employers through personal contacts. It is unclear whether he is registered with recruitment agencies.
 - 12.2 He has not claimed state benefits.
 - 12.3 The Claimant's evidence about his job search and its lack of success to date is credible given that he has little experience outside his employment with the Respondent and even that was a job obtained for him by his father's previous friendship with Mr Wisdom.
 - 12.4 However, although he lives in a rural area, he does have access to a car and he is prepared to travel, as he did with Microtill, for one hour each way from his home to work. He is also not restricting his search to a four-day week and is prepared to work for five days a week and conduct the growing FLT business at weekends and in the evening if necessary.
 - 12.5 The Respondent has not shown any documentary evidence of suitable jobs which are available and for which the Claimant has not applied even though Ms Ware told me that there are plenty of sales opportunities locally.
 - 12.6 In all these circumstances I am satisfied that the Claimant took reasonable steps to mitigate his loss over the course of the first six months (26 weeks) after his dismissal and was unable to obtain alternative employment at the level of remuneration which he had with the Respondent. I therefore award $26 \times £651.52 = £16,939.52$.

- 12.7 Thereafter, for the remaining 17 weeks to the date of assessment I find that he could and should have reduced his losses by taking casual and or temporary work at a lower rate of pay in hospitality, delivery driving, cleaning or similar work for a reasonable minimum 20 hours per week. The National Living Wage rate is £11.44 per hour. $20 \times £11.44$ is £228.80.
- 12.8 If he earned £228.80 per week this would reduce his weekly loss to £ 422.72. $17 \times £422.72 = £7186.24$.
- 12.9 The total for immediate loss of wages is $16,939.52 + £7186.24 = £24,125.76$

13. The Polkey Reduction

- 13.1 The Respondent makes a robust argument that the compensatory award in this case should be reduced because of a 100% likelihood that, even (as here) where the Respondent has failed to follow a fair procedure, a dismissal would still inevitably and promptly have occurred. It says that if a fair process had been observed the Claimant would still have been dismissed.

This is a principle of potential reduction to the compensatory award. It does not apply to the basic award. The principle was set out by the House of Lords in 1987 in the case of Polkey v A E Dayton Services Ltd [1988] ICR 142 and is sometimes called the 'no difference' rule.

- 13.2 The Respondent bases its argument on documentation discovered immediately after the Claimant was dismissed. Ms Ware describes in paragraphs 24 and 25 of her witness statement that she examined the Claimant's work drive on the afternoon of 14 May 2024 and discovered two matters of concern. First, that FLT may be selling Microtill-owned EPOS stock through E-bay and secondly that the Claimant maintained an FLT mileage log for the purposes of eventual submission to HMRC, which appeared to show journeys undertaken by the Claimant possibly in the Respondent's vehicle on the Respondent's time and using fuel paid for by the Respondent.
- 13.3 Thirdly, the Respondent contends that the Claimant was selling, through FLT, EPOS and related items in direct competition with it certainly in the sense that the FLT sale of re-conditioned, redundant, damaged or 'shell' items might prevent potential customers from purchasing a better or newer product direct from Microtill. This would require expert analysis and evidence being presented to a disciplinary panel before misconduct could be confirmed and sanction applied.
- 13.4 The mileage log is on page 119 of the main bundle and shows, highlighted by Ms Ware in orange, for example, dates and times when the Claimant drove to Chelmsford Auction for viewing and sales on dates when the Claimant was due to be working for the Respondent, for example on Wednesday 6 March 2024. His FLT day was Friday. His contracted work days for the Respondent are highlighted in yellow.

- 13.5 In relation to the information discovered after dismissal by the Respondent what is the percentage chance, if it had been available at the time of the dismissal and if a fair process, including reasonable investigation had been followed, that the Claimant would have been dismissed very soon after his actual (procedurally unfair) dismissal?
- 13.6 I find that chance to be 30 % and therefore the compensatory award is reduced by that percentage.
- 13.7 In relation to this question and my conclusion I need make no findings of fact about whether the Claimant actually sold or attempted to sell stock owned by the Respondent. The police are not involved. Similarly, I am not required to decide whether the Claimant misused his company vehicle and fuel and/or carried out FLT business on the Respondent's time.
- 13.8 The Claimant has identified several points of defence to, and mitigation of, the allegations made against him post-dismissal. For example, he says that the car used, as shown on page 116, is his own Audi 5 and not the Skoda company car. He says that, for example, on March 6 2024 he was in Witham in the Skoda and took dated photographs there.
- 13.9 The Claimant states that pages 116-119 are a fabrication and '*wild allegation...a forgery that's been doctored*' despite the document having been discovered on his work drive. Certainly, he shared a slightly different version of it (without the orange and yellow highlighting done by Ms Ware) with Ms Lloyd which both he and she have edited (Ms Lloyd in purple) as can be seen from the 6-page Supplementary Bundle. There is also a version which the Claimant says contains the correct figures and information which he gave to his accountant. That version is pages 22-26 of the Subsequent Bundle.
- 13.10 Any 'forged' alteration of this document is entirely denied by Ms Ware by reference to the Version History of the mileage log on pages 160-162 of the main bundle which shows numerous alterations by the Claimant himself coded in turquoise blue on the tab for the 23/24 FLT Mileage Log
- 13.11 Each of these contentious points would require independent and impartial investigation, possible meta data analysis and evidence from other documents and witnesses before a dismissal was inevitable and procedurally compliant.
- 13.12 In the same way there is considerably more investigation required to establish whether if, when and to what extent, if at all, the Claimant profited his FLT business by selling any equipment owned by the Respondent or in which the Respondent had an interest. For example, at page 167 there is certainly an email dated 22 September 2023 written by the Claimant from his Microtill email address in which he seeks to purchase redundant stock on behalf of FLT from one of the Respondent's customers, the University of Essex.

13.13 In all these circumstances I consider that a **30% Polkey deduction** is appropriate and supported by the evidence. The relevant calculation appears in the Judgment.

14 The grand total payable by the Respondent to the Claimant within 28 days is £27,661.83

Employment Judge B Elgot
Dated: 18 March 2025