EMPLOYMENT TRIBUNALS

Claimant: Mr A Wickenden

Respondent: Kids Funtime Beds Ltd

HELD AT: Manchester **ON:** 7 December 2016

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: In person
Respondent: Mr Thomas Fuller, Peninsula

JUDGMENT having been sent to the parties on 13 December 2016 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

1. Following the promulgation of a judgment on 24 November 2016 whereby I found that the claimant had been unfairly dismissed due to making a protected disclosure under section 103A of the Employment Rights Act 1996 and for raising health and safety issues contrary to section 100(1)(c) of the Employment Rights Act 1996, the matter was listed for remedy today, 7 December 2016.

Claimant's Submissions

2. The claimant submitted that he had made every effort to obtain work since he had been dismissed by the respondent but he had been unsuccessful. Due to the changes in the date of the hearing, the claimant had on a couple of occasions now missed a bus driving course which had had a good prospect of giving him employment. The claimant claimed his losses up to the date of the Tribunal plus a further six months.

Respondent's Submissions

3. The respondent submitted that the claimant had failed to mitigate his loss there was a shortage of drivers in Manchester yet the claimant was still unemployed. He had not produced evidence of his job searches, either directly or from the job

centre to any great extent. Further, the area in which he had sought work was fairly limited. There was no evidence he had sought general labouring jobs yet his C.V. showed he had done this work in the past; In addition he should not have opposed the postponement as then he could have attended the driving course; and that there should be a reduction for contributory fault and for **Polkey**.

The Law

4. Section 123 of the Employment Rights Act 1996 states that Tribunals shall award:

> "…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 insofar as that loss is attributable to action taken by the employer."

5. An employer is allowed to argue that a claimant has failed to mitigate his or her loss under section 123(4) which states that:

> "In ascertaining the loss 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."

6. The burden of proof is on the respondent to establish that a claimant has not mitigate his or her loss.

Polkey

7. The House of Lords in **Polkey v A E Dayton Services Limited [1988]** stated that the no difference rule should no longer apply i.e. that where a procedural irregularity would have made no difference, the dismissal would be fair. The House of Lords said that this rule would not apply except where it would be utterly useless or futile to carry out the required procedure. However, in respect of remedy a respondent can argue that compensation can be reduced on the basis that the claimant would have been dismissed anyway, either by making a percentage reduction or by considering how long it would have taken for the claimant to have been fairly dismissed.

Contributory Conduct

8. Section 123(6) of the Employment Rights Act 1996 states that:

> "Where the Tribunal finds 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."

9. There has to be a causal connection between the behaviour and the dismissal, and the behaviour has to be blameworthy.

ACAS uplift

10. In accordance with section 2017A Trade Union and Labour Relations (Consolidation) Act 1992 a Tribunal can award an uplift to a compensation award

where a respondent has failed to follow ACAS guidance on a fair disciplinary procedure of between 10% and 25% if the tribunal deems it appropriate.

Findings of Fact and Conclusions

11. The claimant was dismissed by the respondent on 17 January 2016. Following this the claimant had been unemployed. The respondent asserted that there was a shortage of drivers in the Manchester area and the claimant should have been able to obtain work by now. They brought examples of such jobs to the Tribunal. The claimant had signed on at the Jobcentre and had satisfied their requirements for applying for jobs, applying for he says at least ten jobs a week. The claimant provided no evidence of this but I accept he would have been sanctioned had he made insufficient effort to find work. The respondent also sought to show the claimant had not looked for work over a large enough geographical area but I am satisfied that his actions in this regard were reasonable.

12. The claimant's CV which he provided showed that in the past he had undertaken building work. He was asked why he had not tried to find building work and he stated this was because he did not have a CSC card, as he could not afford to pay for one although when I asked him he did not know the cost. The respondent suggested after the evidence had concluded that the cost of the CSC card was £40. Whilst this had not been put to the claimant he had stated he did not know the cost. Accordingly I find that the claimant cannot have made any proper enquiries into this issue as he would have known the cost. He had given evidence that following his dismissal he obtained a tax rebate and therefore he did have some additional cash. I find that had the claimant got a CSC card this would have assisted him in obtaining work. Accordingly I find that there is an element of a failure to mitigate his loss.

13. I find that the claimant could have obtained labouring work if he had obtained this card to the extent of the National Minimum Wage, at the sum of £288 a month, and that once the claimant had obtained work it would have been easier for him to obtain another job as it is generally true that it is easier to get a job once you are in work.

14. I find that the claimant would have been able to obtain labouring work by four months after his dismissal. I say four months because it was reasonable of the claimant to try and find similar and commensurate work for a period of time but when this was unsuccessful it would have been reasonable of him to consider work on the National Minimum Wage.

15. Accordingly I have awarded the claimant his losses for four months followed by five months' partial loss of pay, being the difference between the national Minimum Wage and what he was earning with the respondent as I find that by November 2016 he would have been able to have obtained a commensurate role

16. Further, however, although not strictly relevant, I find that the claimant should have agreed to a postponement of this hearing in order to ensure that he could attend a bus driving course he had been accepted on. The claimant was at pains to complain that because of the respondent's postponement request he had had to constantly change the date of this bus driving course and then eventually had to drop out as it was today. However, the respondent had applied for a postponement for today which he had vociferously objected to. I find that while I can understand that in principle the claimant was unhappy about postponing the remedy hearing, given the

importance of this course to obtaining a bus driving job the obvious course of action would have been to agree to the postponement and then he could have attended the course.

Polkey

17. I find it is counterintuitive to apply **Polkey** to a protected disclosure claim as it is not a case that the claimant was dismissed because of some procedural defect, but he dismissed for an impermissible reason – the dismissal was not unfair for a defect (albeit there was no procedure followed) and therefore it appears to me that it is illogical to apply **Polkey**. However, insofar as I have considered it, I find that the respondent did have an issue with the claimant's attitude and if they had raised that with the claimant by way of meetings or warnings there was always a possibility that he might have improved, and there was insufficient evidence to say that he would not have and therefore that he would have been dismissed in any event.

Contributory Conduct

18. I do find that the claimant had a negative attitude across the board which the respondent found wearing (this is a finding in my original Tribunal decision) and that this contributed to his dismissal in part, I find to the extent of 20%.

ACAS Uplift

19. In respect of the ACAS uplift which does apply to dismissals under section 103A of the 1996 Act (even where an individual does not have two years' service), I make an award of 10% uplift. I find it was reasonable to expect some sort of procedure to be followed by the respondent before dismissing somebody, even someone without two years' service; not just a one-off meeting on a day off with no warning. It is in the respondent's interest that they have a proper procedure that is documented. If they had done this in this case they would have been able to be in a better position to persuade the Tribunal of the reasons for the claimant's dismissal, and that would be the case with any other employee in the future. The maximum is 25% and I award 10%.

20. The Tribunal awards the claimant and orders the respondent to pay in respect of the claimants unfair dismissal under section 103A and section 100(1)(c) Employment Rights Act 1996, as follows:

Compensatory Award	
From 24th January to 6th June (20 weeks x £350)	£7,000.00
From 6th June to 31st October (21 weeks x £62)	£1,302.00
Subtotal	£8,302.00
Loss of statutory rights	£350.00
Expenses	£242.00

Subtotal	£8,894.00
Less 20% contributory conduct	£7,116.00
Plus uplift of 10% in accordance with S 207A Trade Union and Labour Relations (Consolidation) Act 1992	£711.00
TOTAL	**£7,827.00**

21. The recoupment regulations apply. The relevant period is 17 January 2016 to 31 October 2016. The prescribed element is £7,827.00.

Employment Judge Feeney

27th February 2017

REASONS SENT TO THE PARTIES ON

28 February 2017

FOR THE SECRETARY OF THE TRIBUNALS