Case Number: 3202091/2015

RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	**Mr M Bukola**
Respondent:	**North Essex Partnership NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**17 February 2017**
Before:	**Employment Judge Russell**
Representation:	
Claimant:	**Mr A Korn (Counsel)**
Respondent:	**Miss G Decordova (Counsel)**

REMEDY JUDGMENT

1. **A basic award in the sum of £1,026.93 (3 x 1 x £342.31)**

2. **There was an 80% chance that the Claimant's employment could and would fairly have terminated after six months. After 22 December 2015, the Claimant is entitled to 20% of his loss of earnings.**

3. **Credit must be given in full for the sums earned in new employment with both Cleanbrite and May Harris (subject to the effect of the Polkey reduction above).**

4. **Compensation for future loss is limited to 22 June 2017 as thereafter the Claimant will have mitigated his loss in full.**

5. **The loss of pension should be calculated by application of the simplified approach during the period for which compensation is awarded.**

6. **There shall be no reduction for contributory fault.**

7. **Loss of statutory rights in the sum of £500 and reimbursement of job search expenses in the sum of £8.**

REASONS

1 By a Judgment sent to the parties on 7 December 2016, the Claimant's complaint of constructive unfair dismissal succeeded. The claim comes before me today by way of remedy hearing. As identified in the liability judgment, the Claimant relied upon the cumulative effect of conduct set out in seven points. For reasons given in the Judgment, the claim succeeded because I was satisfied that the conduct identified at paragraphs 2.2 and 2.4, with paragraph 2.7 as a final straw, had the effect of destroying or seriously damaging the implied term of trust and confidence. In summary, the conduct giving rise to the dismissal concerned the imposition and continuation of a management plan and an ongoing restriction that the Claimant could not attend or work at wards which were not male only.

2 I heard evidence today from the Claimant on his own behalf. On behalf of the Respondent, I heard evidence from Ms Debbie Prentice (Human Resources manager). I was provided with an agreed bundle of documents and I read those pages to which I was taken in evidence and or submission.

Law

3 Section 123 of the Employment Rights Act 1996 provides that the amount of a compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of dismissal, insofar as it is attributable to action taken by the employer. A compensatory award is subject to a maximum of £78,335 or one year's pay, whichever is lower.

4 As for the duty to mitigate, although not cited by the parties, it is trite law that the correct approach is that set out by Langstaff J in **Cooper Contracting Ltd v Lindsey** UKEAT/0184/15/JOJ. The burden of proof regarding failure to mitigate is on the wrongdoer and it is not for the Claimant to prove that she acted reasonably. The Claimant must be shown to have acted unreasonably, which is not necessarily the same as 'not reasonably'. Determination of unreasonableness is a question of fact taking account of the Claimant's views and wishes although the assessment must be objective. The Tribunal should not put Claimants on trial as if losses were their fault, but bear in mind that the central cause of loss is the act of the wrongdoer.

5 Credit must be given to the Respondent for sums earned in mitigation of loss. There is a dispute between the parties as to whether full credit must be given in this case where the Claimant has mitigated his losses but only by taking two jobs with combined working hours exceeding those worked at the Respondent. Ms Decordova relies upon **Ging v Ellward Lancs Ltd** [1991] ICR 222 (although decided in January 1978) as authority for the proposition that the full amount of remuneration earned by the employee in the period between dismissal and the assessment date should be taken as lessening the loss for which he is entitled to be compensated, whether such employment is temporary or permanent. By contrast, Mr Korn submits that there are limits to the period for which credit for remuneration from new employment must be given, relying upon **Fentiman v Fluid Engineering Products**

Ltd [1991] IRLR 151 and upon the general principle that it would not be just and equitable for the Claimant to be required to give credit for extra hours worked so far in excess of those worked for the Respondent.

6 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andres** [2007] ICR 825, EAT as follows:

6.1 in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

6.2 in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

6.3 there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made;

6.4 however, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

6.5 a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

7 Section 123(6) ERA provides that 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 the compensatory award by such proportion as it considers just and equitable having regard to that finding. A basic award may also be reduced pursuant to s.122(2) ERA for such conduct, albeit the causal link need not be established in the same way. Contributory conduct must be culpable, blameworthy, which may include behaviour which is foolish or bloody-minded, depending on all of the circumstances.

8 Although there is no test of exceptionality, it will be unusual for a constructive dismissal to be caused or contributed to by the conduct of the employee as the test for dismissal is a fundamental and repudiatory breach of contract caused by the conduct of the employer. This is particularly so where the term breached is that of trust and confidence as the finding of breach imports within it the requirement that there was no reasonable and proper cause for the conduct. See **Frith Accountants Limited v Law** [2014] IRLR 510, EAT.

Findings of Fact and Conclusions

9 At the date of his dismissal, the Claimant was employed as a senior healthcare assistant, a band three position. He worked 37.5 hours per week with the possibility of additional bank shifts. The Claimant's annual salary for his substantive post was £17,800 per annum and he was a member of the NHS pension scheme. He had completed three years' service and was aged 40 years at the effective date of termination.

Basic Award

10 Based upon three completed years of service, each under 41 years, and a gross weekly pay of £342.31; the Claimant is entitled to a basic award of **£1,026.93.**

Likely earnings if not dismissed

11 With the support of the Respondent, in June 2014, the Claimant had successfully completed a foundation degree in mental health at the University of Essex. Completion of this course entitled the Claimant to apply for a band four position if he wished to do so and to be admitted onto a further training course with the aim of securing a band five mental health nurse position at some point in the future. Whilst it is common practice for ward managers to notify eligible employees of band 4 vacancies as a matter of courtesy, I accept Ms Prentice's evidence that recruitment in the National Health Service is undertaken by way of application and competitive selection. All such vacancies would be advertised on the NHS jobs website and the Claimant bore the responsibility of applying the ordinary way.

12 By the date of dismissal on 22 June 2015, the Claimant had not applied for a band 4 post nor had he applied to commence a further band five training course. For all but six weeks or so during the period from qualification in June 2014 until dismissal in June 2015, the Claimant had been absent from the workplace either due to ill-health or suspension. During this period he retained access to the NHS jobs website and there were jobs available had he wished to apply. I infer from these facts that the Claimant did not want to apply for a band 4 post, whether at the Respondent or in another Trust, whilst the dispute about the management plan and restriction on his workplace remained. This is consistent with his concern about the likely reference which he would receive from the Respondent.

Polkey and likelihood of ongoing employment with the Respondent

13 In the liability Judgment, I found that the Claimant was particularly unhappy about the service user complaints made against him in October 2013 despite the fact that Ms Ngwenya's investigation report had found them neither proven nor unproven. The Claimant had already permanently transferred to Edward House but after receipt of the Ngwenya report, the Claimant was required satisfactorily complete an informal management plan and prevented from working (or later attending) any wards which were not male only. The Respondent had reasonable and proper cause to take seriously and investigate the user complaints, even though the Claimant considered them to be entirely unwarranted. Even after being given a copy of the Ngwenya

report by Ms Paul on 17 October 2014, the Claimant was not satisfied and repeatedly requested provision of the appendices so that he could challenge what he regarded as the untrue allegations. I accepted that the Respondent had reasonable and proper cause not to disclose the appendices.

14 The management plan lacked clarity and objectivity and its implementation was not handled with reasonable and proper cause. Mr Gardner had formed an unduly negative view about the Claimant's behaviour which materially affected his decision to impose the management plan and there was no reasonable and proper cause to deny the Claimant a right of appeal. Despite these criticisms, which were substantial but largely related to procedure, I accepted that there was reasonable and proper cause to restrict the Claimant's work on the 136 suite where he would be required to assess service users of either gender, although not to preventing him from attending public areas on mixed gender wards, for example, to collect documents or see colleagues. The instruction not to work at the Linden centre was clear and reasonable in so far as it included the 136 suite and the suspension had reasonable and proper cause as the Claimant had made clear he would not adhere to the restriction in the future.

15 Finally dealing with the imposition of the warning and the ongoing nature of the management plan, clarity had been provided by Mr Cook about the extent of the restriction upon attending the Linden Centre but that the Claimant did not accept that it was fair. Mr Cook made clear to the Claimant that the plan would not be disregarded or reviewed in the near future (see paragraphs 49 to 51). At paragraph 74, I concluded that there was no attempt to engage the Claimant's underlying argument that it was unjust in circumstances where the allegations against him were unproven, there was no right of appeal and that Mr Cook's explanations regarding non-work and public place restrictions were not objectively plausible and indicated an ongoing refusal to engage with the justice of the restrictions. Even after the disciplinary hearing, the management plan lacked precision, objective means by which the Claimant could demonstrate compliance and had no specified review period.

16 Finally in paragraph 77, I accepted that the relationship had undoubtedly broken down but that the breakdown was said to be based on the Claimant's refusal to adhere to a management action plan which I had found to be significantly flawed in content and process. At times, the Claimant had done nothing to assuage the Respondent's concern that he would continue wilfully to breach the instruction about his workplace, not least in his emails to Ms Paul and his stance in the disciplinary hearing.

17 At all times until dismissal on 22 June 2015, throughout the liability and again in evidence at this remedy hearing, the Claimant has regarded any restriction on his workplace as unjustified. The Claimant's evidence at this remedy hearing again complained that he had been prevented from working bank shifts on mixed wards which unjustly restricted his ability to earn and was unjust as the allegations were not proven. I find that the principal cause of his sense of injustice is due to the substance of the restriction on his ability to work at the Linden Centre, including the 136 Suite. Whilst the Claimant was also aggrieved about the absence of any right of appeal against the management plan or the restriction, the lack of clarity or review

period, I am satisfied on the balance of probabilities that these were of lesser significance. In short, I conclude that unless and until the management plan and workplace restriction were removed altogether, the Claimant would not have been satisfied and would have continued to object. As Ms Prentice put it in her evidence, having a clear review date and greater clarity would not have changed the Claimant's attitude to the plan.

18 Even if the Respondent had implemented a proper and reasonable management plan, I am satisfied that it would have continued to restrict the Claimant's ability to work on the 136 Suite for a period of time whilst his performance could be monitored. Such monitoring had not proven possible to date due to the Claimant's absences and therefore the process would effectively have started from scratch following the disciplinary hearing on 15 June 2015. Based upon the Claimant's evidence as set out above, I conclude that there is a very high likelihood that the Claimant would have repeated his refusal to comply with the workplace restriction. As the period between Mr Clark providing clarity to the Claimant and his previous refusal to comply was only about two weeks or so, I consider that the problem would have arisen again very swiftly. There would thereafter have been a disciplinary process to follow which I consider would have taken approximately six months in total (based broadly upon the length of the previous disciplinary process but without the additional time required to conclude the grievance).

19 Mr Korn submits that no **Polkey** reduction should be made in this case as it requires two levels of hypothesis which render any reduction unduly speculative: what would happen first if a suitable plan were produced and, second, if the Claimant still would not comply. It is possible, as Mr Korn submitted, that the Claimant would have taken advice and modified his attitude had the management plan and restriction been handled properly. However, given that even now the Claimant steadfastly maintains that no restriction was warranted despite a Tribunal Judgment which disagreed with him insofar as the 136 Suite was concerned, I consider that the likelihood of such objective reflection and compliance is low such that the exercise is not unduly speculative.

20 Taking all of this into account, I conclude that there was an 80% likelihood that the Claimant's employment could and would fairly have terminated six months after 22 June 2015 (in other words 22 December 2015). In light of my conclusion above that Claimant did not want to apply for a band 4 post, whether at the Respondent or in another Trust, whilst the dispute about the management plan and restriction on his workplace remained, I consider that he would not have applied for a band 4 position in this time. As such his loss of earnings is to be calculated on the basis of salary of £17,800 (g) per annum or £1,213.66 per month net.

21 Subject to credit for mitigation below, the Claimant's loss during the six months to 22 December 2015 would have been £7,281.96. Thereafter loss continues at £242.73 per month (20% of £1,213.66); subject to any annual increments which the parties agree would apply.

Mitigation and period of loss

22 In the three months following his dismissal, the Claimant applied for work as

a cleaning supervisor but not as a healthcare professional. It was not in dispute that there were many healthcare jobs available for which the Claimant could have applied. The Claimant's evidence was that he was concerned that if he applied for a healthcare assistant job, he would not be successful as the Respondent was likely to provide him with a negative reference. As the Claimant did not want this to jeopardise any future employment prospects in mental health work, he decided instead to secure cleaning work and apply at a date in the future for healthcare work in the hope of a more favourable reference from his last employer. The Claimant successfully obtained two cleaning jobs, both with effect from 17 September 2015.

23 The Claimant's concern about the content of a reference dated back to as early as October 2014. It was discussed in the course of return to work a meeting attended by himself, Mr Clarke and Ms Karen Storey (HR). As confirmed in a letter dated 6 October 2014, Ms Storey advised that the trust had a duty to ensure that references were factually accurate and reflected any formal processes or sanctions to which the employee is subject at the time of the reference request. The effect of this duty was that the Respondent would be under a duty to reveal the final written warning after its imposition on 16 June 2015; it would not have been under a duty to disclose the earlier management plan and workplace restriction as these were informal processes only. In such circumstances, I consider that it was not unreasonable of the Claimant to believe that a reference would be negative and looking at the longer term prospects for his career to decide not to apply immediately for a healthcare position. The Respondent has not proved that the Claimant failed to mitigate his loss in obtaining cleaning rather than healthcare work to date.

24 A reference must be factually accurate but also not misleading overall. In light of the liability Judgment, and in particular its findings in relation to the final written warning and ongoing imposition of the management plan as a final straw, the Respondent may feel that it no longer is appropriate to refer to the final written warning in any future reference or at least to make clear that the imposition of the same was part of the conduct leading to a finding of repudiatory breach on their part. The result of which renders it far more likely that the Claimant will be able to apply for a healthcare post. I accept the Respondent's evidence that many such jobs exist locally and conclude that the Claimant will reasonably obtain such a job (with a NHS pension) and thereby fully mitigate his loss in the near future and certainly within a period of two years in total since dismissal (in other words by 22 June 2017).

Credit for remuneration in work since dismissal

25 The Claimant successfully obtained two cleaning jobs, each with effect from 17 September 2015. The first is with Cleanbrite. From 17 September 2015 until November 2016, the Claimant was working a 30 hour week at a rate of £7.55 per hour. Since November 2016, the Claimant is now contracted to work 42 hours per week at an hourly rate of £8.10 (although in fact this is not always attained). The Claimant benefits from a defined contribution pension scheme into which he and Cleanbrite each pay a 1% per month contribution. From the payslips and spreadsheet produced by Ms Decordova, the Claimant worked some limited overtime in addition to his 30 hours per week such that he earned the total sum of £3,321.20 until the pay date of 18 December 2015.

26 From 17 September 2015 until November 2016 (when his Cleanbrite hours increased), the Claimant also worked for May Harris as a cleaning supervisor. He worked term time only, some 28 weeks of the year, for 15 hours per week. The payslips and spreadsheet show receipt of remuneration of £9,409.91 but with no pension provision.

27 There is a dispute between the parties is the amount of credit which must be given by the Claimant for earnings in this cleaning work. The Claimant's case is that in order to Respondent's case is that credit should be given in full for all sums earned the effect of which is to extinguish the Claimant's losses. By contrast, the Claimant contends that over time or hours worked in excess of the 37 ½ hours per week contracted for the Respondent should be ignored as he need only give credit for income worked during the hours which he would have worked for the Respondent. Both Counsel accept that what is required is a broad brush and equitable assessment, not a precise actuarial calculation.

28 The exercise and accurate comparison of hours worked in each employment by comparison to the Respondent is rendered more difficult because the Claimant's Schedule of Loss is poorly drafted, is at times confusing and was subject to handwritten annotation by Mr Korn in an attempt to make it more reliable. It refers to additional hours worked as shown on payslips but makes no attempt to identify how many or how they affect the overall totals (although Mr Korn did give some examples in his submissions). Doing the best I can, I have taken the total May Harris pay and divided by £9 (as there were no deductions for tax or national insurance) to give total hours worked of 1,045.55 over a 14 month period; in other words an average of 17.2 hours per week for May Harris.

29 Despite the Claimant's failure to identify the number of overtime hours worked for Cleanbrite, for example in a spreadsheet, I had broad regard to the actual payslips between September 2015 and October 2016. These do not support the Claimant's assertion in his Schedule of Loss that he was undertaking a lot of regular overtime indeed more are less than 120 hours per month than are over, suggesting that he was not always working 30 hours per week.

30 Looked at overall therefore, during the period 22 June to 17 September 2015, the Claimant was not working at all. Between 17 September 2015 and 21 October 2016, the payslips suggest slightly more hours for May Harris and slightly fewer for Cleanbrite which I consider broadly balance out at about 45 hours per week, about 7.5 hours per week more than at the Respondent. After November 2016, the Claimant has been working 42 hours per week.

31 In the period to 22 December 2015, I am satisfied that the Claimant must give credit in full for the remuneration earned from Cleanbrite. The hours worked during this period were lower than those worked at the Respondent by approximately 7.5 per week. At the same time, the Claimant was working a further 15 hours per week for May Harris. It would not be equitable to disregard the sums earned at May Harris as the Claimant submits, not least as credit would then be given for fewer hours than would have been worked at the Respondent which would unduly penalise the Respondent. Whilst the Claimant has been working slightly harder to mitigate his losses since September 2015, I am not satisfied that the relatively small difference in

weekly hours renders it just and equitable to disregard any part of his remuneration from new employment over the entirety of the period. There is no principle of law to which I was taken which holds that credit must only be given for the same number of hours worked as in the previous job. There will often be differences between the original job and work taken in mitigation, for example differences in working hours or holiday entitlement, which will render the latter less congenial. Nevertheless, I prefer Ms Decordova's submissions and, applying **Ging**, accept that credit must be given for the full amount of money earned in mitigation (subject to the effect of the **Polkey** reduction from 23 December 2015).

Contributory Fault

32 Mr Korn relies upon **Frith**, and submits that no reduction for contributory fault is appropriate both because there was no sufficiently culpable conduct and also because, even if there were, it was not causative of the dismissal. Ms Decordova submits that this case may be distinguished from **Frith** as there was a direct link between the Claimant's unreasonable behaviour in the sense of his wilful refusal to engage with the plan which led to the disciplinary action and the action which caused the conduct which amounted to dismissal.

33 As set out in my conclusions about **Polkey**, this is case in which I found that there was reasonable and proper cause for some of the Respondent's conduct but not for all of it. The conduct which amounted to dismissal was the Respondent's mishandling of the management plan and the workplace restriction. Undoubtedly the Claimant did not help himself at times, for example in his attempts to resurrect the Jackman complaint during the Lofthouse investigation; but this was not conduct which caused the dismissal as set out in the liability Judgment. Equally undoubtedly, the Respondent did not help itself at times, in particular the unfairly negative view formed by Mr Gardiner, the repeated refusal to release the Ngwenya report to the Claimant or to permit any appeal or challenge to the need for the management plan. This however was the conduct which I have found amounted to the dismissal, in other words which caused the dismissal. As I have found that the Respondent's conduct on these points was not with reasonable and proper cause I prefer the submission of Mr Korn to that of Ms Decordova and find that any conduct by the Claimant could not be said to be causative. Further, I take into account that insofar as the Claimant may have appeared bloody-minded or wilful at times, this was borne out of the frustration of not being permitted to challenge a restriction on his workplace which he perceived to be unjust. Conduct must be regarded in all of the circumstances of the case to determine whether it meets the standard of blameworthy or culpable. In this case, even if not objectively helpful, I am not satisfied that the Claimant's conduct was culpable given that the very conduct which caused dismissal was that which caused his frustration in the first place. As such, no reduction is appropriate to the basic award either.

Pension Loss

34 Ms Decordova submitted that as the Claimant could and should have obtained employment within the NHS as a healthcare professional, he has not mitigated his pension loss alternatively that loss should be calculated on the simplified basis given the number of available healthcare jobs which the Claimant

can get. Mr Korn accept that it the period of loss was for 12 months or under, the simplified approach would be appropriate but that actuarial evidence would be required for any longer period of loss. Both agreed that previous guidance provided to the Tribunals in calculating substantial pension loss is no longer reliable given the changes to public sector pension schemes.

35 As set out above, I have concluded that the Claimant is entitled to compensation for six months at full salary and a further 18 months at 20% of salary, whereafter the Claimant will be able to get a NHS job with pension. It appears to me that in the circumstances, the simplified approach is appropriate for the entirety of this period. In other words, six months of employers contributions at £83.07 and then 18 months @ 20% of employer contributions.

Loss of Statutory Protection and expenses

36 The Claimant has lost valuable employment rights by reason of his dismissal. Whilst he has been employed by Cleanbrite since September 2015 and would otherwise regain employment protection in some seven months' time if he remained in their employment, I bear in mind that the compensation for future loss has been limited to June 2017 on the basis that the Claimant will or should reasonably have obtained new healthcare employment by then. This would require him to start from scratch in the acquisition of employment rights and, for this period, I consider that it would be just to award the sum of £500 as claimed. The Claimant also claims reimbursement of expenses for job searches in the sum of £8. This was not challenged and appears reasonable.

Total amounts

37 I am aware that the Claimant's salary with the Respondent would have increased automatically in or about April 2016 and again in April 2017. These increments should be reflected both in the compensatory award and the pension loss. Counsel assured me that this could be done by agreement between the parties once the principled decisions on period of loss were known. For this reason, I have not sought to calculate precise figures for the compensatory award preferring to leave it to the parties. I would be grateful if the parties could notify the Tribunal in writing within 28 days of this Judgment to confirm that all outstanding matters have been resolved and that no further hearing is required.

Employment Judge Russell

22 February 2017