



## REASONS

1. The Tribunal heard evidence on oath from the Claimant and heard and read submissions from the representatives of both parties.

### Pension contributions

2. The Tribunal accepted the Respondent's submission that although the Respondent contributed towards the Claimant's pension premiums, it was not an occupational pension scheme but a personal pension policy. The policy still exists and the Claimant could, if he wished, continue to contribute into it or transfer it to another employer. His loss is not the value of the fund, it is the loss of the monthly contributions which were £277.26 per month.

### Contributory conduct

3. The Respondent submitted that the Claimant was guilty of contributory conduct and that the basic and compensatory awards should be reduced by at least 75%.
4. I did not find that the Claimant was guilty of any culpable or blameworthy conduct which caused or contributed to his dismissal. On the contrary, at paragraphs 40 and 41 of the Judgment Reasons, it is stated:

*... There was a failure to conduct a reasonable investigation and insufficient evidence upon which to determine that any failings by the Claimant justified dismissal. ... The dismissal fell outside the range of reasonable responses. No reasonable employer would have concluded that the Claimant was responsible, much less wholly and solely responsible, for the state of affairs about which it was concerned. Nor would any reasonable employer have treated the matter as sufficient to justify dismissal.*

### Polkey

5. A Polkey deduction (Polkey v EA Dayton Services Ltd [1987] IRLR 50) is a reduction in a compensatory award for future loss to reflect the chance of a fair dismissal in any event.
6. I find that in this case, if a fair process had occurred the Claimant would not have been dismissed.
7. The Respondent submitted that the Claimant could and would have been fairly dismissed for other matters as follows:

25. *It is submitted that on the facts as they stand in this case, the Claimant would have been fairly dismissed in any event at the same time or within a short period of time thereafter. In particular:*

*(a) It was reported on 1<sup>st</sup> June 2015 by Ms Axton that she had witnessed someone in March 2014 driving up the access road, taking a gun out of the boot of a car and wandering off into the woods, She said that she reported it to the maintenance team who confirmed that they knew about it {AW:58} [211]. Had the Claimant not been dismissed on 1<sup>st</sup> June 2015 it is likely that this would have resulted in his dismissal. [215]*

*(b) On 19<sup>th</sup> May 2015, a non-conformance report dated 6<sup>th</sup> January 2015 was discovered which identified legionella in part of the School's hot water system and required corrective action to be taken. The Claimant failed to take any corrective action or bring this matter to the attention of Mrs Watmough. {AW:63-70} [167]*

*(c) Further, it was discovered that since November 2014 the Claimant had failed to ensure that the recommended flushing regimes for taps (designed to guard against legionella build up) had not been observed since November 2014. [160-1663] {AW:69}*

*(d) The Claimant failed to maintain the School's sewage treatment plant, such that on 22<sup>nd</sup> September 2015 sewage overflowed on to neighbouring land, with obvious potential environmental implications for the School. {AW:74-75} [231-233, 235]*

*(e) In November 2015, the Respondent discovered that the Claimant had failed to clean, maintain or empty the chemical storage tank which collected the chemical and other waste for the science labs in the School. It was so full that in times of high rainfall it would cause chemicals to leach into the School's general surface water drainage, again with obvious potential environmental implication for the School. {AW76-78}*

*(f) There were a number of other significant failings on the Claimant's part {AW:71} in respect of his duties as head of maintenance [205, 207-209] in that:*

- (i) He failed to undertake any risk assessments for work carried out by the maintenance team;*
- (ii) He failed to communicate risk assessment and risk control measures to the maintenance team;*
- (iii) He failed to maintain competency and training records for the maintenance team;*
- (iv) He failed to keep records of formal, regular safety inspections of the premises; and*
- (v) Failed to ensure that PAT tests were up to date.*

*(g) In addition, the Claimant failed to ensure that the School's security lights were functioning correctly, rather he merely marked the non-functioning lights with tape but never arranged for them to be repaired.*

*26. The erosion of trust and confidence in the Claimant for the reasons stated above would have been such that it was highly unlikely that the Claimant would have retained his employment, especially given the live final written warning that was in place in relation to his performance in relation to health and safety issues [164-165]."*

8. In V v Hertfordshire County Council [2014] the Employment Appeal Tribunal said that the test is "What were the chances of a fair dismissal on other grounds?"
9. The information at (a) was taken into account by the Respondent in support of the dismissal.
10. The information at (b) was a matter within the knowledge of the Respondent before he was dismissed on 2 June 2015. The Respondent did not conduct an investigation into this matter as would satisfy the requirements for a fair dismissal, but chose instead to dismiss the Claimant for other reasons.
11. So far as the other matters at paragraphs (c), (d), (e), (f) and (g) were concerned, again there was no sufficient investigation undertaken by the Respondent as would satisfy the requirements for a fair dismissal. The Claimant was not given the opportunity to respond to these allegations.
12. The basis for the Respondent's submission was that because the Claimant was the head of the maintenance team, and all these matters involved maintenance, the Claimant must therefore be culpably responsible for all the alleged failures. That was the same broad approach taken by the Respondent in respect of the actual dismissal which was found to be unfair. It takes no account of the possibility of others being responsible or any explanation by the Claimant. In fact, the Claimant had a plausible explanation for many of these matters.
13. For example, in respect of the flushing regime for taps at (c) above, the Claimant explained in his evidence that it was simply a matter of not recording the flushing regime, but it had been done. He was awaiting a firm to come in and perform a re-test as had happened in previous years. He denied that he had let the flushing regime lapse and said that since he had previously been told by the Head Teacher that he must spend less time in the office and more time out on site, he had not had time to ensure that records were updated.
14. In respect of the chemical storage tank at paragraph (e) above, the Claimant said that it had been inspected by a responsible company who emptied it and

- on the last occasion told him that it did not need emptying regularly. He said that he checked the levels and kept an eye on it.
15. In respect of the sewage overflow at paragraph (d) above, the Claimant said that he had arranged for a responsible company who had arranged a service but the overflow happened well after he had left employment.
  16. I took account of the Employment Appeal Tribunal decision in Software 2000 Ltd v Andrews & Others [2007] ICR 825 and considered that in view of the lack of any sufficient investigation or reliable evidence which would support a fair dismissal, and the Respondent's tendency to pre-judge the Claimant as responsible for any maintenance related failure, the exercise of seeking to reconstruct what might have been was so uncertain that no sensible prediction based upon the evidence could properly be made.
  17. The submissions made by the Respondent based upon the above matters were not accepted.
  18. There was no just and equitable reason to reduce the amount of compensation based upon these matters.

Mitigation

19. The Claimant gave evidence of his efforts to find suitable alternative employment following his dismissal on 2 June 2015. He produced a table which included 14 applications. He eventually obtained part-time employment of 25 hours a week with Inchcape Retail UK in Guildford. It was a driving job commencing on 3 August 2015 at a wage of £172.60 net for a 25 hour week.
20. He continued in this job until August 2016 when he and his wife re-located from Hampshire to Devon. He did not provide any evidence of job-seeking from August 2016 up to the date of this remedy hearing.
21. In cross-examination, the Respondent put to the Claimant a range of job vacancies proximate to his previous home in Hampshire, because they were unaware that he had moved to Devon in August 2016. All of the job vacancies post-dated the Claimant's move. Although he accepted that most of the vacancies would have been of interest to him, it was clear that many would have been unsuitable due to lack of experience or qualifications.
22. I was satisfied that up to August 2016, the Claimant had taken reasonable steps to mitigate his loss. Even though he had taken employment at a lesser rate than his role with the Respondent, it was not unreasonable for him to take such a job in the circumstances in which he found himself. He was aged 60 at the date of dismissal and it was not unreasonable for him to conclude that he was not going to easily find a full-time job with managerial responsibilities at the same rate as he was paid by the Respondent. He

confirmed that although the job with Inchcape was part-time, as it was based in Guildford and taking into account travel time to and from the depot, he was actually occupied for full days.

23. In these circumstances, I considered that it would be just and equitable to award loss of earnings from the date of dismissal in June 2015 up to the end of August 2016 when the Claimant gave up his job and moved to Devon. Thereafter, he was not in employment and the only evidence that he could produce of seeking alternative work and mitigating his loss was that he had an interview coming up.

ACAS Code of Practice

24. The Respondent submitted that compensation should be reduced by reason of the Claimant's unreasonable failure to appeal the decision to dismiss.
25. The Claimant explained that after the appeal against the final written warning was rejected by the Chair of Governors, he felt that no matter what he did or said he was going to be dismissed. When he was dismissed he considered that an appeal would be pointless as it would be an appeal to the same Chair of Governors as before.
26. The only part of the Code of Practice with which the Claimant failed to comply was the appeal stage. Given the circumstances of the dismissal, the involvement of the same people in the final written warning and the dismissal, and the perception of hostility regarding his continued employment found to have existed at paragraph 30 of the Tribunal Reasons, I find it was not unreasonable or blameworthy for the Claimant to fail to exercise his right of appeal.

Remedy

27. The Claimant was employed from 1 January 1995 to 2 June 2015 (20 years). Gross weekly pay was £551.40. Net weekly pay was £434.32. The Claimant's age at the date of termination was 60 years.

Basic award

1 year x 1 (multiplier) x £475 (maximum weekly pay)	475.00
19 years x 1.5 (multiplier) x £475	13,537.50
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Total basic award	14,012.50

Compensatory award

Loss of statutory rights	500.00
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Loss of earnings

2 June 2015 – 31 August 2016  
75 weeks x £434.32 32,574.00

Less actual earnings during this period  
66 weeks x £172.60 -11,391.16

Pension contributions

15 months x £277.26 4,158.89

Total compensatory award 25,841.73

Tribunal Fees

The Tribunal made a Costs Order under rule 76(4) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Tribunal issue fee 250.00

Tribunal hearing fee 950.00

Total tribunal fees 1,200.00

Recoupment Regulations

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the above award for loss of earnings.

The dates of the period to which the prescribed element is attributable is 3 June 2015 to 2 August 2015, a period of 9 weeks.

The prescribed element is £3,908.88 (9 x £434.32).

The monetary award is £41,054.23.

The amount by which the monetary award exceeds the prescribed element is £37,145.35 (£41,054.23- £3,908.88).

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Employment Judge Vowles

31 January 2017

Sent to the parties on: .....

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For the Tribunals Office