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EMPLOYMENT TRIBUNALS

Claimant: Mr R Pugh

Respondent: D & K Europe Limited

Heard at: Birmingham **On:** 7 and 8 March 2018

Before: Employment Judge Jones

Representation

Claimant: In person

Respondent: Mrs M Peckham (Solicitor)

JUDGMENT

1. The claimant was unfairly dismissed by the respondent contrary to sections 94 and 98 of the Employment Rights Act 1996 (ERA). The Respondent is ordered to pay the claimant compensation of £13,720.63, calculated according to the Schedule below.
2. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this award. The prescribed element is £6,102.70. The dates of the period to which the prescribed element is attributable are 1 September 2018 to 8 March 2019. The excess of the total award over the prescribed element is £7,617.93.

Employment Judge Jones
Dated: 1 April 2019

Schedule

1. The claimant does not seek reinstatement or reengagement. I considered it just and equitable to make a compensatory award.
2. I have found there was a 75% likelihood that, had a fair redundancy selection process been followed, the claimant would have been retained by the respondent as a production operative at a salary of between £18,000 and £20,000 pa. I have therefore applied a reduction of 25% to the compensatory award below to reflect the likelihood that he could still have been dismissed, applying the rule in Polkey v A E Dayton Services Limited [1988] ICR 142.
3. The claimant had been signed off work with stress and anxiety for some time before the date of termination and has remained unfit for work since that date. However, I accept on the evidence that the precipitating factor for his stress and anxiety was the manner in which the redundancy consultation process was conducted and the resulting decision to select and dismiss him. Prior to being placed at risk of redundancy he had an excellent attendance record and had not suffered with mental health problems before. Had he been offered an alternative position with the respondent I have found he would have been fit for work and continued working for the company.
3. Since 28 November 2018 the claimant has been unfit for work due to diabetes and resulting eyesight problems. He is awaiting surgery to remove cataracts. The claimant submitted that his diabetes was brought on by stress but there was no medical evidence to support this. On the balance of probabilities I have concluded that the claimant's diabetes and related eye condition are not illnesses related to his redundancy and if still employed by the respondent the claimant would therefore have been off work sick from 28 November 2018 due of these conditions.
3. There was no evidence about when the claimant would have his cataract operation or how long it would take him to recover. In the absence of any evidence I have assessed he would have had the operation and become fit for work by 1 July 2019.
4. I have therefore based the calculation of the claimant's lost earnings on a gross annual income of £19,000 (the mid-way point between £18,000 and £20,000). A weeks pay is thus £365.38 (gross) and £310.57 (net). From 1 September 2018 to 28 November 2018 and from 1 July 2019 to 8 March 2020 the calculation of loss is based on his full net pay. Between 28 November 2018 and 28 April 2018 the claimant's contract entitled him to sick pay at 50% of his salary. Between 29 April and 31 July 2019 he was not entitled to sick pay as his contractual entitlement was then exhausted. He was entitled to full sick pay again from 1 August 2019.
5. Notwithstanding his age, his current health condition and his limited transferrable skills due to the length of time he had worked for the respondent, I consider the claimant will be able to find new employment, at a level of pay commensurate with what he would have earned as a production operative, within 12 months from the date of this hearing, i.e. by 8 March 2020.

6. The detailed calculation of the award of compensation is set out below.

A. Basic Award (section 120 ERA)

nil

The claimant received a redundancy payment from the respondent of the full amount payable under section 120 ERA.

B. Compensatory award (section 123 ERA)

a) Loss to date of hearing

1/9/18 to 27/11/18 12 weeks @ 310.57	3,726.84
28/11/18 to 8/3/19 14.4 weeks @ 155.285 (half pay)	2,236.10
9/3/19 to 28/4/19 7 weeks @ 310.57	<u>2,173.99</u>
Subtotal	8,136.93
Less 25% "Polkey" reduction	- <u>2,034.23</u>
<u>Total loss to date</u>	<u>6,102.70</u>

b) Future loss

1/8/19 to 8/3/20 31.2 weeks @ 310.57	9,689.78
Less 25% "Polkey" reduction	- <u>2,422.45</u>
Subtotal	7,267.33
<u>Add</u> compensation for loss of statutory rights	350.00
<u>Total future loss</u>	<u>7,617.33</u>

c) Grand Total (a + b) £13,720.63