



EMPLOYMENT TRIBUNALS

Claimant: Ms C Ho
Respondent: The Overseas Chinese Association (SW Region)
Heard at: Bristol
On: 9 March 2017
Before: Employment Judge O'Rourke

REMEDY JUDGMENT

The Respondent is ordered to pay the Claimant the sum of £3861.00, as set out in the attached schedule.

REASONS

Introduction

1. The reserved liability Judgment of 16 January 2017 found that the Claimant succeeded in her claim of unfair dismissal.
2. Both parties agreed that the issue of Remedy could be dealt with by way of written submissions, which have been provided to the Tribunal.
3. The liability judgment found that while the Claimant's dismissal was unfair, applying **Polkey v A E Dayton Services Ltd [1988] ICR 142 UKHL**, an eventual fair dismissal was inevitable had a fair procedure been followed.

Submissions

4. Claimant. The Claimant's submissions were limited to provision of a schedule of loss and an email stating that, while she had seen the Respondent's submissions, she was not in a position to provide legal argument to counter it.
5. Respondent. The Respondent's submissions can be summarised as follows:

- 5.1 Both the Basic and Compensatory awards should be reduced, by no less than 75%, to reflect the Claimant's contributory conduct towards her dismissal.
- 5.2 There should be no uplift for any failure by the Respondent to follow the ACAS Code and instead the award should be reduced by no less than 15%, to reflect the Claimant's failure to attend the disciplinary and appeal hearings.
- 5.3 That as it has been found, subject to **Polkey** that the Claimant's eventual fair dismissal was inevitable, the Compensatory Award should be extinguished, or reduced by no less than 80%.
- 5.4 The Tribunal was reminded as to sequencing of such deductions.
- 5.5 The Claimant is not entitled to pay in lieu of notice because, being in fundamental breach of her contract, for which summary dismissal was justified.

The Law

- 6 The Respondent referred the Tribunal to ss.122(2), 123(1) and (6) and 124A Employment Rights Act 1996.
- 7 **Steen v ASP Packaging Ltd [2014] ICR 56 EAT** identified the correct approach in assessing contributory fault (applicable to both Basic and Compensatory Awards): identify the relevant conduct; decide whether it's culpable or blameworthy and if it is, whether it's just and equitable to reduce the amount.
- 8 Any deduction can be up to 100% in an appropriate case (**W Devis & Sons Ltd v Atkins [1977] ICR 662 EAT**).
- 9 **RAO v Civil Aviation Authority [1994] ICR495 EWCA** indicates that any contributory fault deduction should be made before any **Polkey** deduction.

Conclusions

- 10 **Polkey.** Having found that the Appellant's eventual fair dismissal was inevitable, had a fair procedure been followed, I conclude that that notional 'fair procedure' would have taken two further weeks, before a fair dismissal. The period of time taken for investigation would have been an additional week, to allow for the investigating officer to fill those 'gaps' in the investigation identified in paragraph 39 of my liability judgment. That additional time would have pushed the disciplinary hearing into the Christmas holiday, necessitating its arrangement for early in the New Year, say, end of the first working week, 8 January 2016, with a few additional days for consideration of the decision, giving a dismissal date of 11 January 2016.
- 11 **Compensatory Award** The Claimant's Compensatory award is therefore limited to two weeks' net pay - £346 in respect of loss of earnings and a statutory award of a statutory week's pay of £475 – total £821.

- 12 Pay in Lieu of Notice. I agree with the Respondent's submissions on this point: summary dismissal without notice or payment in lieu was justified.
- 13 Contributory Conduct. I have considered the issue of contributory conduct and while it is clear from my liability judgment that there has been potentially culpable or blameworthy conduct by the Claimant, I do not consider, for the following reasons, that it is just and equitable to reduce either her Basic or Compensatory award:
- 13.1 The *de minimis* principle applies to the Compensatory award. The amount is so small as to render consideration of contributory conduct pointless.
- 13.2 The Basic award is designed to compensate the employee for the loss of job security caused by the unfair dismissal, by awarding a sum almost exactly equivalent to a statutory redundancy payment. The Claimant suffered such job insecurity for approximately four months and is, taking into account her relatively lengthy and good previous service, entitled to this award, without deduction – therefore £1840.
- 13.3 The Respondent would, otherwise, escape without any penalty for its conduct of the investigation.
- 14 Uplift for failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. I find that the actions of both parties in their handling of this matter – the Respondent in its conduct of the investigation and the Claimant in her refusal for no good reason to attend the relevant hearings, effectively 'cancel out' each other and I therefore make no uplift or reduction.
- 15 Reimbursement of Tribunal Fees. As the Claimant paid a Tribunal fee in the sum of £1200, she is entitled as to consideration of its reimbursement by the Respondent. Rule 76(4) of the Employment Tribunal's (Constitution and Rules of Procedure) Regs 2013, Sch.1 states that:

'(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) (in respect of a Tribunal fee paid by a party) where a party has paid a Tribunal fee in respect of a claim ... and that claim ... is decided in whole, or in part, in favour of that party.'

Rule 78(1)(c) states that such a costs order may

(c) order the paying party to pay the receiving party a specified amount as reimbursement of all or part of a Tribunal fee paid by the receiving party.'

The Claimant's claim of unfair dismissal succeeded and I therefore consider that reimbursement of the full fee paid is appropriate.

Conclusion

16 In conclusion, therefore, I order the sums set out above and as detailed in the attached schedule to be paid by the Respondent to the Claimant.

Employment Judge O'Rourke

Date 9 March 2017

REMEDY JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS

REMEDY SCHEDULE

Unfair Dismissal

Basic Award - £ 1840.00

Compensatory Award

Loss of earnings for two weeks, at £173.00 per week (pw) - £ 346.00

Loss of Statutory Rights - £ 475.00

Total - £ 2661.00

Fee Reimbursement **£ 1200.00**

GRAND TOTAL £3861.00