Case No: 2201145/2015

EMPLOYMENT TRIBUNALS

Claimant: Ms C Ramos Alvarez

Respondent: Royal Borough of Kensington & Chelsea

Heard at: London Central **On:** 7 September 2017

Before: Employment Judge H Grewal

Representation

Claimant: Mr V Khanna, Lay Representative

Respondent: Mr T Walker, Counsel

JUDGMENT

1 The Respondent is to pay the Claimant compensation in the sum of £81,355.78 made up as follows –

Basic award - £35.80

Additional Award - £25,428.00

Compensatory Award - £55,891.38

2 The Claimant's application for a preparation time order is refused.

3 The Respondent's application for costs is refused.

4 The Claimant should be able to recover the £250 fee that she paid for bringing the claim from the government. In the event that she is unable to do so she may apply to the Tribunal for an order that that be paid by the Respondent.

REASONS

1 This hearing was listed to determine what compensation should be awarded to the Claimant under section 117 of the Employment Rights Acts 1996 ("ERA 1996") following the Respondent's failure to comply with the order to reinstate her and costs applications made by both parties.

Compensation

2 It was not in dispute that the redundancy payment of £8,032.70 could be offset against any basic award payable to the Claimant. At the hearing I accepted that the redundancy payment had exceeded the basic award and that no basic award was, therefore, payable. Upon looking at it again, it appears to me that that was an error because the Respondent had used the incorrect statutory maximum for a week's pay. Please see paragraph 3 (below) for the maximum to be applied in the case of awards made under section 117(1) ERA 1996. On the basis that £489 is the correct maximum for a week's pay, the Claimant is entitled to a basic award of £8,068.50. A basic award of £35.80 is, therefore, payable to the Claimant.

3 The Respondent did not dispute that the Tribunal could award the maximum of fifty-two weeks' pay (subject to the statutory maximum) as an additional award under section 117(3)(b) ERA 1996. The maximum set in The Employment Rights (Increase of Limits) Order 2017 applies where "the appropriate date" falls after 6 April 2017. The appropriate date in the case of an award under section 117(1) or (3) ERA 1996 is the date by which the order of reinstatement should have been complied with (article 4(2)(l) of the 2017 Order). The appropriate date in this case is 28 July 2017. The maximum set in the 2017 Order is £489. I made an additional award of £25,428.

4 The Respondent conceded that compensation payable to the Claimant would exceed the maximum amount that the Tribunal could award and that she was entitled to the maximum. I had to determine what that maximum was.

5 Section 124(4) ERA 1996 provides,

> "*Where –*
> *(a) a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and*
> *(b) an additional award falls to be made under paragraph (b) of that subsection,*
> *the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) …"*

6 Section 114 ERA 1996 provides,

> "*(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed.*

(2) On making an order for reinstatement the tribunal shall specify -

(a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement,
(b) any rights or privileges (including seniority and pension rights) which must be restored to the employee and,
(c) the day by which the order must be complied with.

(3) If the complainant would have benefited from an improvement in his terms and conditions of employment had he not been dismissed, an order for reinstatement shall require him to be treated as if he had benefited from that improvement from the date on which he would have done so but for being dismissed.

(4) In calculating for the purpose of subsection (2)(a) any amount payable by the employer, the tribunal shall take into account, so as to reduce the employer's liability, any sums received by the complainant in respect of the period between the date of termination of employment and the date of reinstatement by way of -
(a) wages in lieu of notice or ex gratia payments paid by the employer, or
(b) remuneration paid in respect of employment with another employer
and such other benefits as the tribunal thinks appropriate in the circumstances."

7 At the time that I made the order for reinstatement I did not have the details of what the Claimant would have been paid and of the contributions that would have been made to her pension between 10 December 2014 and 28 July 2017. I, therefore, did not specify the amount that was payable to her under section 114(2)(a) ERA 1996. The order that I made was for the Respondent to pay her a lump sum to reflect the wages that she would have received during that period and to restore her pension rights and seniority by taking steps to ensure that her period of service was preserved for the period between 10 December 2014 and 28 July 2017 and by making any payments that needed to be made into the pension fund for that purpose.

8 The issues that I had to determine were:

(a) Whether the Claimant would have increased her working hours to 36 hours per week between December 2014 and July 2017;
(b) Whether she would have been promoted during that period;
(c) Whether the payments made to the pension fund for restoring her rights would fall within section 114(2)(a) ERA 1996; and
(d) Whether, under section 114(4) ERA 1996, the pension payments received by the Claimant should be deducted from the sum payable to her under section 114(2)(a).

9 On 3 August 2012 the Claimant had asked to reduce her working hours from 36 hours a week to 33.5 hours per week. The Claimant suffered from diabetes and hypertension and in 2012 her medication for hypertension had been increased. She was concerned because a friend of hers who was about the same age as her and had also suffered from hypertension had needed a heart operation and had had to

retire on health grounds. The Claimant's request was granted and on her return from annual leave in September 2012 she started working 33.5 hours per week. The situation was reviewed in March 2013 and the Claimant's request to continue working reduced hours on a permanent basis was granted. The Claimant worked 33.5 hours until her employment terminated in December 2014. She never asked for her hours to be increased. Since the Claimant stopped working there has been no change in her hypertension or the medication that she takes for it. The medication that she takes for diabetes has increased. As there has been no change in the Claimant's medical condition in the last three years, I consider it extremely unlikely that she would have increased her hours had she continued working for the Respondent between December 2014 and July 2017.

10 There was no evidence that prior to her dismissal the Claimant had been actively pursuing promotion. She accepted in her evidence that it was unlikely that as a legal secretary she would have been promoted in Legal Services. She said that she could have moved to another department and sought promotion. She had worked in the same department for many years and had not sought to move. The three legal secretaries who had been retained when the Claimant was dismissed were still working as legal secretaries in the legal services department. I considered that it was extremely unlikely that the Claimant would have been promoted had she continued in employment between December 2014 and July 2017.

11 Jamie Steere, Payroll Manager, gave evidence about what the Claimant would have been paid and the contributions that would have been made to her pension had she continued in employment between 11 December 2014 and 31 July 2017. His evidence was not challenged and I accepted it. The Claimant would have been paid a gross salary of £68,885.94 during that period. The Respondent would have deducted from that the sum of £4,477.71 to represent her contributions to her pension. It would also have deducted tax and employee National Insurance contributions from that. The net pay that the Claimant would have received during that period would have been £51,702.24. In addition, the Respondent would have paid to the pension fund £10,389.20 as the employer's pension contribution.

12 The evidence of Maria Bailey, Pensions Manager, was that in order to restore the Claimant's pension rights both the employer and the employee contributions for that period (i.e. the sum of £14,866.91) would have had to have been paid to the pension fund. She also said that if the Claimant had been reinstated and treated as if she had continued in employment since December 2012 the pension fund would have recuperated from her the lump sum and monthly pension that she had received.

13 The Respondent's submission was that there were three possible interpretations. These were:

(a) All matters relating to pension, including any capital payments to be made by the employer, fell within section 114(2)(b) ERA 1996;
(b) The payment of the employer's pension contributions fell within section 114(2)(a) ERA 1996; or
(c) All payments required to restore the Claimant's pension rights (including the employee contributions) fell within section 114(2)(a) ERA 1996.

The Respondent's submission was that both (a) and (b) above were right and it was prepared to adopt (b), but that (c) was wrong. The argument was that (c) was wrong because section 114(2)(a) talked about any amount that was payable by the

employer and the employee's contributions were not payable by the employer but by the employee.

14 I did at one stage consider that everything relating to restoring pension rights, including the payments to be made, fell within section 114(2)(b) but concluded, on reflection, that that was not correct. What the Tribunal was required to do under section 114(2)(b) was simply to specify which rights and privileges were to be restored. Any payments to be made by the employer in respect of the benefits that the Claimant lost as a result of the dismissal and not being employed between the date of dismissal and reinstatement fell within section 114(2)(a). That included payments to cover pension contributions that had not been made during that period.

15 I then considered whether that applied just to the employer's pension contributions or both the employer's and the employee's pension contributions. Had the Claimant continued in employment, the Respondent would have deducted a total of £4,477.71 from her pay as employee pension contributions, and would have paid that amount into the pension fund. The only purpose of deducting it was to pay it as her contribution to the pension. The Respondent's calculation of the arrears of pay to be paid under section 114(2)(a) (£51,702.24) is based on that sum having been deducted. If the Respondent's argument is that it does not have to pay the employee's contributions to restore her pension rights, then the amount to be paid as arrears of pay should include the sums that have been deducted for her pension contributions. The Respondent cannot deduct that sum unless it is to be used to make the employee pension contributions. I am, therefore, satisfied that it would be correct to include the sum of £4,477.71 in the amount payable by the employer to confer on the Claimant the benefit that she would have had in relation to her pension. It would have been payable by the employer as part of the Claimant's wages (which she would then have used to made her pension contributions) or as a sum that it had deducted from her wages to make her pension contribution.

16 Between 11 December 2014 and 31 July 2017 the Claimant received as pension a lump sum of £4,722.44 and monthly payments, the net total of which was £11,837.10. In making any award under section 114(2)(a) ERA 1996 I would have considered whether it would be appropriate to take those sums into account in order to reduce the employer's liability. The Respondent submitted that it should have been deducted from any award under section 114(2)(a) because she only received those payments because she had been dismissed. If her pension rights were reinstated she would receive the lump sum whenever she became entitled to her pension. If they were not deducted the Claimant would end up by getting more than she would have had she not been dismissed. She would get her arrears of pay and the pension payments and get her lump sum twice. I would have accepted that argument had Ms Bailey's evidence not been that if the Claimant had been reinstated the pension fund would have recouped those sums from the Claimant. On the basis of that evidence, I would not have deducted those sums because the Claimant was not going to retain the money that she had received from that source. If she had to repay the money, she was not going to end up with more than if she had not been dismissed. In light of that, I would not have deducted those sums from the order that I made under section 114(2)(a).

16 If I had had the figures to hand when I made my reinstatement order I would have ordered the Respondent to pay the Claimant the net sum of £66,569.15 (£51,702.44 arrears of pay + £4,477.71 employee's pension contributions which the Respondent

deducted from the Claimant's pay + £10,389.20 employer's pension contribution).

17 It was agreed that that figure needed to be grossed up. I have adopted the Respondent's method of grossing up. The Claimant will receive £21,967.30 as a tax free termination payment (£30,000 less the redundancy payment of £8,032.70) and her personal allowance will be £6,809 (£11,500 less the Claimant's pension income of £4,691). Therefore, the amount that the Claimant will have to pay tax on would be £39,900.85 (£66.569.15 - £26,668.30). The Claimant will pay 20% tax on £33,500 and 40% tax on £6,400.85. Those two figures grossed up come to £52,543.08 (£41,875 + £10,668.08). I then added to that the tax-fee elements of £21,967.30 and £6,809. That comes to a total of £81,319.98. The aggregate of the additional award and the compensatory award cannot exceed that sum.

Costs

18 The Respondent applied for the costs that it incurred between the presentation of the claim on 2 April 2015 and 10 November 2016, the vast majority of which it claimed were incurred in defending the claims of race and disability discrimination, the last of which was withdrawn on 10 November 2016. The total costs incurred in that period were £43,743.24. It applied on the grounds that the discrimination claims had had no reasonable prospect of success and that the Claimant and/or her representative had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing or conducting the discrimination claims.

19 The Claimant applied for a preparation time order in the sum of £6,800 for the 200 hours the Claimant's lay representative said that he that he spent working on her case. She also applied for a costs order for the fee of £250 she had paid to bring her claim. She applied on the grounds that the Respondent had acted vexatiously, abusively, disruptively or otherwise unreasonably in the way that it had conducted proceedings. She relied in particular on the fact that the Respondent's defence of the unfair dismissal claim had no reasonable prospect of success and that it had not conceded that the dismissal was unfair until 29 November 2016 and that it had refused to comply with the Tribunal's order for reinstatement.

20 The procedural history of the proceedings is set out at paragraphs 1 - 7, 47 – 51 and 53 of the remedy decision sent to the parties on 29 June 2017 and I do not intend to repeat it here. It is clear from that that the Claimant had brought a large number of race and disability discrimination claims and that they had necessitated three preliminary hearing in this case. However, with the exception of a single claim of discrimination arising from disability in respect of the dismissal, all the other discrimination claims had been withdrawn by 29 February 2016. The unfair dismissal claim was not conceded until 29 November 2016.

21 I do not accept that the Claimant's complaints of race and disability discrimination had no reasonable prospect of success. I accept, however, that they had little reasonable prospect of success, not least because all the complaints, except those relating to dismissal were out of time. Unless the Claimant established that her dismissal was an act of race and/or disability discrimination, the Tribunal would not have had jurisdiction to consider the pre-dismissal complaints unless it considered it just and equitable to do so. In light of the time that had lapsed since most of them, it was unlikely to do so. The Claimant was going to have difficulty establishing that her scores in the redundancy exercise (by Mr Pitt or the panel as a whole) were

influenced in some way by her race and/or any disability, or that they had deliberately applied the weighting incorrectly to disadvantage her.

22 I concluded that the Claimant did not act unreasonably in bringing those complaints but that she did act unreasonably in not complying with the Tribunal's orders and by not withdrawing those claims earlier. The Respondent's solicitors had on a number of occasions in "without prejudice" pointed out to the Claimant the unlikelihood of those claims succeeding and the Claimant's ultimate withdrawal of them indicates that she recognised that too. The Respondent could have been saved considerable costs had she done so. I do not accept that the Claimant brought what she believed were unmeritorious claim in order to be awarded uncapped compensation.

23 I also concluded that the Respondent acted unreasonably in not conceding that the dismissal was unfair before it did. Its defence of that claim had no reasonable prospect of success. There was no basis for linking the concession of that claim to the Claimant abandoning her discrimination claims. The Claimant might have abandoned her discrimination claims earlier if the Respondent had conceded unfair dismissal earlier. It was not clear to me how much of the preparation time claimed by the Claimant's lay representative had been spent on preparing the unfair dismissal claim. The concession was made several months before the hearing was listed to take place.

24 In considering whether to make an order against either party I took into account that both parties had acted unreasonably. I also took into account the Claimant's means. She has no assets or savings. She is living with friends. She has not managed to find work and thinks that she is unlikely to do so because of her age. She is not in receipt of any benefits. Her only income is her pension of £386 per month. She clearly does not have the means to comply with any order for costs. The Respondent submitted that I could take into account the compensation that she will get for the unfair dismissal. She will get about £26,000 compensation if the Respondent's appeal to the EAT succeeds. She will get substantially more if it does not. I am not prepared to take the figure that I have awarded into account as there is a chance that the Claimant might not receive that. As far as the figure of £26,000 is concerned it barely compensates for her the losses that she has actually suffered as a result of the unfair dismissal. In circumstances where both parties have acted unreasonably and the Claimant has very limited means, I did not consider it appropriate to award costs to either side.

Employment Judge Grewal
30 October 2017