



EMPLOYMENT TRIBUNALS

Claimant: Ms D Birkin

Respondent: Sherwood of Nottingham Limited

Heard at: Nottingham

On: Tuesday 3 July 2018

Before: Employment Judge Macmillan (sitting alone)

Representatives

Claimant: Ms D Scales, Solicitor

Respondent: No appearance

JUDGMENT

1. The Respondents will pay the claimant compensation for unfair dismissal in the sum of **£6,452.25**.
2. The Respondents are ordered to pay the Claimant compensation for untaken holiday in the sum of **£370.36**.
3. The Respondents are ordered to pay the Claimant compensation for disability discrimination in the sum of **£15,435.81**

REASONS

The issues

1. On 27 April 2018 a judgment in default of a response under rule 21 was issued in these proceedings. Ms Birkin complains of constructive unfair dismissal, disability discrimination and non-payment of holiday pay. The matter is before me today for remedy. There is of course no appearance for the Respondents. Ms Birkin has been represented by her solicitor Ms Scales and I have heard evidence from Ms Birkin.

The facts

2. Ms Birkin had been employed by the Respondents for over 4 years until she resigned on 17 November 2017. She was employed as a credit controller. She is a disabled person with limited mobility following an unsuccessful spinal operation and fibromyalgia. She resigned after a lengthy period of difficulty with

the Respondent's Managing Director Mr Cavani. This included a refusal, against her doctor's advice, to allow her to cease working on Friday's in order to give her 3 consecutive work free days to give her a chance to rest and recuperate, there being no obvious business reason for the refusal. On 22 August 2017 as she was leaving the building for a routine medical appointment Mr Cavani said something to her along the lines of "I suppose you're going off sick again... well don't bother coming back". Believing she had been dismissed, she consulted solicitors and it was only after they e-mailed the Respondent to enquire what the position was that Ms Birkin was told she had not been dismissed.

3. She was then signed off sick for a week but went abroad on a pre-booked holiday. As the cause of her sickness was work related stress she contends that that week should not have counted towards her entitlement to annual leave. She sent further sick notes to the Respondent covering the period 6 September to 30 November. In the meantime, her solicitors had submitted a formal grievance complaining about the Respondent's treatment of her as a disabled person. The Respondent refused to engage in the process even though their solicitors had been made aware that the grievance had been raised. Eventually, on 15 November the Respondent was warned by Ms Birkin's solicitors that if they did not confirm a hearing date for her grievance by close of business that week she would resign and initiate ACAS early conciliation. No response was received and Ms Birkin therefore resigned.

4. Ms Birkin has now succeeded in finding alternative employment. However, it is less well paid, twice the travelling distance from her home and requires her to purchase an annual parking permit in the sum of £680.00 from Nottingham City Council.

5. During her employment with the Respondent, Miss Birkin's gross annual salary was £23,500 which equates to £1,958.33 per month or £451.92 a week. The daily gross pay was £90.38. Her net week's pay was £370.36. She commenced her new employment on 4 December 2017 at a net weekly pay of £338.00 which produces an ongoing loss of £32.36 a week. Under her contract of employment with the Respondent she was entitled to one month's notice of termination. During her prolonged period of sickness absence, for most of the time she was paid full salary which is the Respondent's custom and practice. However, for the last 7 weeks without explanation this was reduced to statutory sick pay only in the sum of £88.45.

5. Miss Birkin has obviously suffered a significant amount of distress as a result not only of the loss of her employment but in particular because of the Respondent's conduct towards her culminating in her resignation.

Remedy

6. I make the following awards of compensation.

7. Unfair dismissal

7.1 Basic award

Ms Birkin's basic award is 4 weeks gross pay: therefore $4 \times £451.92 = \mathbf{£1,807.68}$.

7.2 Compensatory award

Although Ms Scales has split the compensatory award into 3 components, namely notice pay for the first month, then compensatory award from the expiration of that month to the date of hearing followed by future loss, I do not

think that that is the appropriate methodology. Although the difference is marginal, Ms Birkin commenced new employment after only two weeks and Ms Scales's methodology does not give the Respondent the credit they are entitled to for her earnings after that initial two-week period. The compensatory award up to the date of hearing is therefore as follows.

- (a) Loss of earnings from 20 November to 1 December: 2 weeks at £370.36 = £740.72.
- (b) Loss of earnings from 4 December to 3 July 2018, 30.3 weeks at £32.36 = £980.50.
- (c) Future loss from 14 July 2017 to 16 November 2018, 19 weeks at £32.36 = £614.84.
- (d) The loss of statutory industrial rights I award the conventional sum of £350.00.
- (e) For the additional expenses involved with her new employment I award the sum of £680.00 as the cost of the annual car parking charge and £349.60 being the total additional petrol costs which the Claimant incurs over the course of the year = £1029.60
- (f) This gives a total compensatory award of £3,715.66.
- (g) Because of the Respondent's unreasonable failure to comply with the statutory grievance procedure, I uplift that award by 25%: a figure of £928.91.
- (h) The total compensatory award is therefore £4,644.57.
- (i) When added to the basic award this produces a total award of compensation for unfair dismissal in the sum of **£6,452.25**.

8. Holiday pay

The one week's holiday which Ms Birkin took while she was on sick leave should not count towards her annual statutory holiday entitlement. Therefore, when she left the Respondent's employment she had accumulated but not taken one week's holiday for which she is entitled to be compensated. The Respondent is therefore ordered to pay her compensation for untaken holiday in the sum of **£370.36**.

9. Disability discrimination

9.1 The only financial loss is the difference between Ms Birkin's weekly pay and the statutory sick pay which she received in the last 7 weeks of her sickness absence. This absence appears to have been caused either by Mr Cavani's failure to make a reasonable adjustment to her working hours or his disability related harassment. The compensation for this element of the claim is £1,973.37.

9.2 Ms Birkin is entitled to compensation for injury to feelings. In my judgment, this case falls squarely within the band of the so-called **Vento** bands of compensation which had a lower limit of £8,400 and an upper limit of £25,200 in the period in which Ms Birkin's resignation fell. I regard this as a case where the Respondent's conduct is such, and the effect on Ms Birkin is such, that the award should be higher - but not significantly higher - than the bottom end of the middle band. I therefore award her compensation for injury to feelings of £10,000.

9.3. Ms Birkin is entitled to interest on her discrimination compensation award of £11,973.37. The discriminatory date is 22 September 2017. The calculation date is the date which falls midway between that date and the date of this hearing, namely 11 February 2018. The applicable interest rate is 8% and the number of days between the date of the discriminatory act and the calculation

date is 143 days. This produces interest of £375.28.

9.4 The total compensation for disability discrimination is therefore £1,973.37 + £10,000 + £375.28 + £12,348.65.

9.5 Again because of the Respondent's failure to follow the statutory grievance procedure, that award falls to be uplifted by 25%, a figure of £3,087.16, producing a combined figure of compensation for disability discrimination of **£15,435.81**.

Summary

10. In total therefore the Claimant is entitled to the following compensation:-

- Holiday pay - £370.36
- Compensation for unfair dismissal (including the basic award) - £6,452.25
- Compensation for disability discrimination £15,435.81
- Total compensation: **£22,258.42**

Employment Judge Macmillan
Date: 30th July 2018

JUDGMENT SENT TO THE PARTIES ON

04 August 2018

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FOR THE TRIBUNAL OFFICE