Reserved judgment

EMPLOYMENT TRIBUNALS

Claimant: **Mrs B Starling**

Respondent: **Epsom & St Helier University Hospital NHS Trust**

Heard at London South Employment Tribunal on 30 May 2018

Before Employment Judge Baron

Lay Members: **Ms C Bonner and Mr G Henderson**

Representation:

Claimant: ***Rachel Barrett***

Respondent: ***Lance Harris***

JUDGMENT AS TO REMEDIES FOR THE CLAIMANT

It is the judgment of the Tribunal that an order be made under section 115 of the Employment Rights Act 1996 that the Claimant be re-engaged by the Respondent on terms agreed between the parties but subject to the findings below.

REASONS

1 I must first of all apologise to the parties for the delay in being able to deal with matters arising at, and also following this hearing. This has been due to a combination of delays caused by a shortage of administrative staff, and also the severe pressure on judicial resources.

2 Following a hearing in June 2017 the Tribunal made a finding that the Claimant had been unfairly dismissed by the Respondent. This was a hearing to decide upon a remedy for the Claimant. At the outset of the hearing the Tribunal was informed that it had been agreed that a re-engagement order be made under section 115 of the Employment Rights Act 1996. There was no agreement on the part of the order referred to in section 115(2)(d). That broke down into three issues. The first related to the Claimant's contractual sick pay entitlement and when the Claimant would have returned to work. The second was whether any order should be made on the basis of the Claimant notionally having worked on a part-time or a full-time basis. The third was whether pension payments received ought to be deducted. We will deal with each in turn.

3 The issue as to the date when the Claimant would have returned to work if she had not resigned with effect from 29 February 2016 was refined. Miss Barrett for the Claimant submitted that the date would have been 24 October 2016 whereas Mr Harris, on behalf of the Respondent, argued for 8 December 2016. Any finding we make must of necessity be somewhat speculative, but we have to do the best we can based on what did in fact occur.

4 We recorded in our findings of fact when considering the merits of the Claimant's claims that in August 2015 there was a diagnosis that the Claimant had a brain tumour, and that she was operated on in October 2015. We also recorded in our judgment that the Claimant was reported in April 2016 as being 'entirely back to her normal self' and that she started work for the Respondent on a bank basis from 18 October 2016.[1] That now appears to have been an incorrect date, and the first shift that the Claimant actually worked was on 7 December 2016.

5 At this hearing we were referred to various new documents. We have also looked at documents in the original trial bundle and which were briefly mentioned by the Claimant in her first witness statement. The information we glean is below.

5.1 The Claimant contacted the Respondent about a return to work on 3 October 2016 as on that day Elisha Parkinson sent her an email setting out the formal requirements for re-employment, including 'Occupational health'.

5.2 On the same day an email was sent to the Claimant saying that she had been successful in her application to join the bank subject to pre-employment checks, and she was told that she had to complete an OH questionnaire.

5.3 There was an internal file note concerning the Claimant coming back to work which was apparently made by an Occupational Health Assistant dated 24 October 2016. It contained a brief record of the Claimant's medical history and then the following note: 'Fit for post as long as EPP bloods come back clear'.

5.4 There were various documents concerning the Claimant then attending training courses in connection with bank work.

5.5 On 2 November 2016 a Consultant Neurologist recorded that the Claimant's nocturnal seizures were consistent with epilepsy, and an urgent MRI scan was requested.

5.6 On 8 December 2016 the Consultant diagnosed epilepsy after having received the scan results. The report to the Claimant's GP was dated the following day. A copy was sent to the Claimant.

6 The conclusion we have reached on this point is that the correct date for the notional commencement of work after the Claimant's surgery was 31 October 2016. Miss Barrett argued for 24 October 2016, but the OH approval of that date was subject to the blood tests being satisfactory.

[1] Paragraph 53

Clearly they were satisfactory, although we had no direct evidence on the point. We have allowed a week for those tests to be carried out and for arrangements for the Claimant to start work on a phased basis.

7 We do not accept the submission by Mr Harris that the date should be 8 December 2016. That submission was made on the basis that it was very unlikely that the Claimant would have returned to work while investigations into her condition were continuing. However that is clearly not the case as the Claimant did seek to return to work, and further undertook some training before starting work on 7 December. That was before her consultation of 8 December and her receiving the report of the following day.

8 The next issue is whether any amount to be paid to the Claimant should be calculated on a part-time or full-time basis. Mr Harris reminded us that the Claimant had in fact only worked on a part-time basis since joining the bank in December 2016. He referred us to a report dated 13 April 2018 prepared by a Consultant Occupational Physician in which it was stated that the Claimant was fit for her then current working environment and current working hours, and also that the Claimant agreed with him on the matter. We note that the report did not say that the Claimant would be unable to undertake more hours.

9 Mr Harris submitted that after such a long absence a phased return to work was what was most likely to have occurred, but did not make any further submissions as to the details of such arrangement. Miss Barrett agreed that a phased return to work would have been likely, but submitted that the Claimant would have been paid her full salary during that period.

10 Miss Barrett referred us to *Electronic Data Processing v Wright* [1986] IRLR 8 EAT, and in particular to paragraphs 7 and 10 of the judgment of Popplewell J. We do not find that authority to be of great assistance because the facts were so very different. That case related to an unfair redundancy dismissal following which an order was made that the employee be re-engaged in a different role. The redundancy was unfair only due to a lack of consultation. Here the circumstances are that the Claimant was ill. In our judgment we simply have to go back to the wording of the statute and apply the relevant provision. We agree with Miss Barrett's submission that what we must do is seek to ascertain what would have happened absent the Claimant's resignation.

11 This matter is made more complex because of the Claimant's pension arrangements. Following her resignation the Claimant claimed her NHS pension with effect from 7 December 2015. We accept her evidence that in practice she had little option but to take the extra income. As ever, pension rules are complex. We accept the Claimant's evidence that she understood that if she were to work for more than 16 hours a week before she became 60 in September 2017 then her pension would be adversely affected. Mr Harris accepted that that was what the Claimant believed, although it may have been incorrect. However, he said, there could not have been any such issue after September 2017.

12 We conclude as follows. Firstly, that the Claimant would have received contractual sick pay on the basis of her contractual entitlement related to her role in the ACU from 25 August 2015. We understand from Mr Harris that entitlement to be six months at full pay and six months at half pay, but that is not a finding of fact. On that basis the second issue therefore is what the Claimant would have received for the period from 25 August to 29 October 2016. We conclude that she would not have received any salary. We regret that we are not able to make a decision as to what, if any, pension contributions would have been made in respect of the Claimant because we do not have that information. Our third conclusion is that from 30 October 2016 the Claimant would have been working on a phased return to work basis in the ACU and that she would have received full salary.

13 The final matter again relates to pensions. The question is whether the pension payments actually received by the Claimant ought to be deducted in accordance with section 115(3) which is as follows:

> (3) In calculating for the purposes of subsection (2)(d) 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 re-engagement by way of--
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> (a) wages in lieu of notice or ex gratia payments paid by the employer, or
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> (b) remuneration paid in respect of employment with another employer,
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> and such other benefits as the tribunal thinks appropriate in the circumstances.

14 Mr Harris submitted that if the pension payments actually received by the Claimant were not taken into account then she would benefit from double recovery and would be in a better position than if she had remained employed. What the Tribunal must do, he said, was to put the Claimant in the same position as if she had not resigned.

15 Miss Barrett disagreed and referred the Tribunal to *Knapton v ECC Card Clothing Ltd* [1996] IRLR 756 EAT. We entirely agree that that decision covers the point and is binding on us. There will not therefore be any allowance for, or offsetting of, pension payment actually received by the Claimant.

Employment Judge Baron

Dated 28 January 2019