

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4100205/2017 Held in Glasgow on 7 March 2018

5 Employment Judge Shona MacLean

Mrs Elizabeth McCarthy  
10 Claimant  
Represented by:  
Ms L MacSporran  
Solicitor

Joan's Carers Ltd  
15 Respondent  
Represented by:  
Mr G Bealey  
Consultant

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Employment Tribunal is that the respondent shall pay to the  
20 claimant a monetary award of £29,708.97. The Employment Protection (Recruitment  
of Jobseekers Allowance and Income Support) Regulations 1996 do not apply.

### **REASONS**

#### **Introduction**

1. After the hearing on liability the Tribunal issued its judgment to parties on 27  
25 November 2017 that the claimant was unfairly dismissed by the respondent  
(the Liability Judgment). This hearing was arranged to decide remedy.
2. The claimant gave evidence confirming that she was seeking compensation.  
She was referred to productions.
3. The issues that the Tribunal had to decide were:  
30
  - a. What is the appropriate remedy?
  - b. If compensation is to be awarded what is the claimant's loss and what if  
any deductions should be made?
4. In relation to those issues the Tribunal found the following facts to have been  
proved or agreed.

35 **Findings in Fact**

5. At the date of termination of her employment the claimant was 46 years of age. The respondent had continuously employed her for 14 years. The claimant's gross weekly wage was £605.65. Her net weekly wage was £474.91.
- 5 6. Around 29 November 2016 the claimant received a letter from the Scottish Social Services Council (SSSC) saying that it had received information from the respondent that the claimant was dismissed (production 3). If she applied for a role that required registration with the SSSC she would need to make an application and that the information should be declared in that application and would be taken into account when considering the claimant's suitability for registration. At that stage the claimant would be asked to give comments on the information. The letter also confirmed that the information did not in itself mean that the claimant would not be thought suitable for registration. Each case would be considered individually and a decision would be made when the claimant entered relevant employment and submitted an application to the SSSC.
- 10 7. The claimant understood that from around October 2017 it was mandatory for all employers/agencies providing care workers to have those care workers registered with the SSSC.
- 15 8. The claimant telephoned the SSSC on receipt of the letter to say that she was appealing the decision to dismiss her. She was informed that the respondent should write to SSSC if the decision did not stand.
- 20 9. The claimant made several enquiries at nursing homes to see if she could find alternative employment. This was not unreasonable given that this was where her experience lay. When asked by prospective employers why she had left her earlier employment she disclosed that she was dismissed for gross misconduct. The claimant also sought bar work and work in a local taxi office. The claimant also made an application to Waitrose. She was unsuccessful.
- 25

10. The claimant did not apply for Jobseekers' Allowance as she understood that she would not be eligible for this given her husband's earnings.
11. The claimant sent her claim form to the Tribunal's office on 17 January 2017.
12. While employed by the respondent the claimant provided care services to clients. The claimant was approached by two former clients of the respondent to provide her services to them directly. The claimant agreed to do so. It took some time to set up the care packages. She did not need to register with SSSC to undertake this work. It was not unreasonable for the claimant to become self-employed
- 10 13. From 6 April 2017 the claimant has been providing services to two clients, four times a day, six days a week at a net weekly pay of £275.27.
14. The claimant has not registered with SSSC. It is her intention to do so given that it is now mandatory.
- 15 15. The claimant expected that she was to have an operation to her right arm in late 2017. Her operation has been cancelled twice. It was performed on 6 March 2018. At this stage the claimant acknowledges that she is not fit to work although she hopes to do so in the "couple of weeks".

*Observations on evidence*

- 20 16. The claimant was in discomfort and pain while giving evidence as she had had surgery on her arm the day before. The Tribunal's impression was that she was anxious to get this episode over and move on with her life. While the Tribunal expected that the claimant was taking some form of pain relief she gave her evidence in a straightforward and candid manner and appeared more focused than at the liability hearing.
- 25 17. The Tribunal acknowledged that the claimant did not provide written evidence of the various enquiries that she made to find alternative employment from January 2017. The Tribunal did, however, find the claimant to be genuine and reliable when giving oral evidence.

18. The Tribunal believed the claimant when she said that she thought the respondent had to contact the SSSC if there was any change in circumstances. In the Tribunal's view this seemed plausible given that when the claimant spoke to SSSC the claimant had not raised her Employment Tribunal claim and she was still wanting to return to work with the respondent. That said, it is clear from the letter that the fact that the respondent had given the information it would not necessarily mean that the claimant would not have been registered when she later made an application.
19. The Tribunal also considered that the claimant's evidence about being approached by former clients of the respondent was plausible particularly as in the meantime those clients were no longer being serviced by the respondent. The Tribunal also thought it was more likely than not that there would have been a delay in setting up the arrangement for the claimant to provide these services on a self-employed basis.
20. The Tribunal also accepted that the claimant did not apply for Jobseekers' Allowance as she believed that she was not eligible because of her husband's earnings. The Tribunal accepted that was the claimant's understanding and that it was not an attempt by her to avoid applying for jobs.

## **Submissions**

### *The Claimant*

21. The Tribunal was referred to Section 123 of the Employment Rights Act 1996 (the ERA).
22. The claimant's evidence was that she wanted to be employed by the respondent and had not wanted to leave. While Mr Graham Jnr had taken away some of her management responsibilities it was not to say that she would necessarily leave or would have been dismissed, it was possible that she would put up with the situation and realise that this was the only way in which she could continue to work for the respondent. It was therefore argued that she would have stayed there for the foreseeable future with no intention of leaving because of Mr Graham Jnr.

23. The claimant took reasonable steps to find new employment. It was reasonable for her to focus on the care sector. It was also appropriate that she should seek to find employment within the care sector given that she had been in that field for 17 years and that was where she had experience. The Tribunal was invited to accept the claimant's evidence that she had difficulty finding employment in that sector because of the need to have SSSC registration and employers asking for why she had left her earlier employment. It was reasonable for the claimant to be truthful in her answer and explain that she had been dismissed.
24. The claimant had been approached by former clients asking her to provide the service privately on a self-employed basis. She did not require to be registered before this and had taken reasonable steps to provide those services. It was argued that the claimant should be entitled to an award in respect of statutory rights.
25. In relation to mitigation the Tribunal was referred to the case of *Cooper Contracting Ltd v Lindsey (UK/EAT/0184/15/JOJ)*.
26. The Tribunal was invited to find that the claimant acted reasonably in seeking new employment. The claimant gave examples of contacting various agencies and nursing homes. She had met difficulties because of her dismissal and there was difference between being reasonable as opposed to unreasonable. The onus was on the respondent to show that the claimant had been unreasonable. She was not acting unreasonably.
27. From April 2017 to date she had not acted unreasonably in that she had obtained employment. She had found work with two clients working approximately 30 hours per week during which she attends two clients, six days a week, four times a day. The claimant set up a business. Given the level of service it would be difficult for her to increase the number of people for whom she could care. Had she given that up there was no guarantee that she would be moving to any more secure employment.

28. The claimant said that she was going to undertake an operation from November 2017 which she had now had. She was also unable to take up employment.

29. She made no reduction for mitigation and no reduction for loss of employment by believing the period of dismissal or at some other point in the future.

30. As regards any suggestion of a parting of the ways what should be factored in was the extent to which that might not have happened had the disciplinary process not been undertaken. The claimant would not have chosen to leave.

31. Turning to contributory conduct it was submitted that the Tribunal's findings did not support that argument. Where there were criticisms made there was no finding that that contributed to the dismissal. It was borne out of the relationship that the claimant had with the respondent that related to one incident but had there been a proper investigation then that information would have become known. That was not enough to give rise to contributory conduct. The Tribunal had said that the claimant was a thorn in Mr Graham Jnr's side, not that her conduct was a reason for dismissal.

32. With regard to the future loss it doesn't show as to what is just and equitable. The claimant at this stage is not able to confirm the length of time that she will require to not work as that because she had just had an operation.

#### *The Respondent*

33. The respondent accepted that the burden was on it but the Tribunal was referred to paragraph 12 of *Cooper (above)*.

34. The respondent submitted that between October 2016 and April 2017 there was no evidence that the claimant looked for any job. She decided to do nothing. She did not seek any benefits as to do so she would require her to prove she was seeking jobs. The claimant did not want to do so.

35. From April 2017 onwards, the claimant was happy to work for her clients. She decided not to look for anything else. She had a duty to mitigate her loss. If she was not working in the care sector she could have looked for other jobs.

Being registered was only mandatory from October 2017, she could look elsewhere. She made no effort to contact SSSC or make an application for registration.

5 36. The claimant wants to be self employed and therefore there was no loss of statutory rights as she is not acquired any.

37. The Tribunal was referred to paragraphs 52, 97, 207 and 208 of the Liability Judgment. It was submitted that the claimant was likely to leave the respondent.

10 38. The Tribunal was also invited to make reduction in respect of the claimant's own behaviour leading towards her dismissal. The Tribunal was referred to paragraphs 44, 47, 48 and 223 of the Liability Judgment. The claimant did not disclose what actually happened on 7 September 2016. Had she done so then the chances of her being dismissed would have been reduced. She was evasive and her behaviour should result in a reduction of 33 percent.

15 39. The claimant has confirmed that she would not be able to work for the next few weeks and therefore that must affect the calculation of future loss.

### **Deliberations**

40. The Tribunal having found that the complaint of unfair dismissal was well founded moved onto consider the appropriate remedy.

20 41. While the claim form referred in section 9.1 to the claimant seeking re-engagement this was not a remedy that she requested at the remedy hearing. The claimant said that she was looking for an award of monetary compensation.

25 42. The parties had agreed the claimant's weekly wage as £605.65 gross and £474.91 net. They had also agreed that the basic award was £7,903.50 based on a multiplier of 16.5 multiplied by £479 being the statutory cap on a week's pay.

43. The Tribunal considered whether the claimant's conduct before dismissal was such that it made a reduction of the basic award just and equitable. The Tribunal referred to Section 122(2) of the ERA. The Tribunal noted that it had a wide discretion whether or not to reduce the basic award on the ground of the employee's conduct. In relation to the basic award the Tribunal noted that it is unnecessary that the employee's conduct should have caused or contributed to the dismissal.
44. There was no doubt that the claimant had a medical appointment on 7 September 2016. She had informed the respondent of this but did not attend her appointment because she lost her mobile telephone. The respondent knew that the claimant had not attended the appointment even though she had not told said so at the time. While the Tribunal considered that the claimant ought to have informed the respondent, had the respondent carried out a reasonable investigation this would have become apparent and in any event, it was only one of several absences for which the claimant was dismissed. Accordingly, the Tribunal did not consider that it was right to reduce the basic award.
45. Regarding the claimant's compensatory award the Tribunal considered whether to award the claimant compensation for loss of earnings. Normally the Tribunal would assess the immediate loss and if appropriate any future loss. The limit to the compensation that a Tribunal may award on a finding of unfair dismissal is that it must only cover loss that flows from the unfair dismissal.
46. The Tribunal decided to award the claimant compensation for immediate loss of earnings from the date of dismissal to the date of the remedy hearing.
47. The Tribunal assessed the sum payable as being 73 weeks at £474.91 per week that is £34,668.43.
48. From this sum must be deducted the claimant's earnings from new employment. The claimant became self-employed from 7 April 2017. Her

earnings from them until the remedy hearing are 48 weeks at £275.27 per week that is £13,212.96.

49. The claimant's immediate loss is calculated at £21,455.47 that is £34,668.43 - £13,212.96.

5 50. The Tribunal considered whether the claimant had mitigated her loss. The claimant applied for jobs in the care sector but was unsuccessful. The Tribunal found that it was not unreasonable for the claimant to initially seek employment in the care sector where she had worked for many years. The Tribunal appreciated that having been dismissed for gross misconduct the  
10 claimant had difficulty in obtaining new employment. The claimant then broadened her job search and applied for work in other sectors but was still unsuccessful.

15 51. While there might have been other work available in the care sector for which the claimant could have applied there was no evidence that she would have been offered employment. The Tribunal considered that having been approached by clients for whom she had previously given services it was not unreasonable for the claimant to become self-employed. It did not involve her seeking registration with the SSSC and she was working with clients with whom she was familiar and likely to succeed. The Tribunal also considered that it was  
20 not unreasonable for the claimant to have at that stage restricted to providing her services to two clients as she attended them four times a day, six days per week. The Tribunal was satisfied that she had taken reasonable steps in mitigation.

25 52. However as regards future loss of earnings while the Tribunal accepted that the claimant had decided to become self-employed the Tribunal considered that given the Liability Judgment if the claimant applied for registration with the SSSC the claimant she was likely to be successful. Also, having undergone her operation should she wish to do so she could apply for other employment in the care sector which might allow her earnings to return to the  
30 level that she had with the respondent. While the Tribunal accepted that the claimant did not choose to leave the respondent the Tribunal was not

convinced that the claimant would have remained employed by the respondent indefinitely. The Tribunal's reasoning was that the claimant had management and care experience which Mr Graham Jnr did not value. He was becoming more involved in the respondent's management and the claimant did not respect him. Had there not been disciplinary action the Tribunal considered it more likely than not that the claimant would have eventually sought new employment where her experience would have been appreciated. The Tribunal considered it was unlikely that the claimant would have been remained in the respondent's employment and therefore did not make any future award other than a payment of £350 in respect of loss of statutory employment rights.

53. The Tribunal then referred to Section 123(1) of the ERA and considered whether the compensatory award should be reduced to reflect general considerations of fairness. In particular whether the claimant could have been fairly dismissed at a later date if the respondent had followed a proper procedure.

54. The Tribunal was not satisfied on the information available that a fair dismissal would have taken place later. While the claimant's explanation of what happened on 7 September 2016 was equivocal the Tribunal did not consider that this justified dismissal let alone summary dismissal. As regards the other allegations the Tribunal considered that from the evidence before it a reasonable and balanced investigation would not have given rise to a belief that the claimant had been guilty of gross misconduct.

55. The Tribunal then referred to Section 123(6) of the ERA and considered the claimant's contributory conduct, if any and the extent to which it caused or contributed to the claimant's dismissal. While the claimant's explanation of what happened on 7 September 2016 prompted the suspension the Tribunal felt that the claimant's behaviour was used by the respondent as an opportunity to suspend and would under other circumstances been a storm in a tea cup. The Tribunal considered that it was regrettable that the claimant did not speak to Mrs Graham about what happened on 7 September 2016.

However the Tribunal was not satisfied that there was contributory conduct by the claimant that would make it just and equitable to reduce the compensatory award for contributory fault.

56. Taking account of all these heads of claim, the total monetary award to the claimant is calculated as follows.

5	a.	Basic award:		7,903.50
	b.	Compensatory award		
		Immediate loss £34,668.43 - £13,212.96	21,455.47	
		Future loss	<u>350.00</u>	<u>21,805.47</u>
10		Total		<u>£29,708.97</u>

57. The total monetary award was calculated at £29,708.97.

58. In respect that the claimant was not in receipt of Jobseekers Allowance the Employment Protection (Recruitment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply.

15

Employment Judge: S MacLean  
 Date of Judgment: 16 March 2018  
 Entered in Register: 19 March 2018  
 and Copied to Parties

20