EMPLOYMENT TRIBUNALS

Claimant: Mrs LAXMI BELL

Respondent: SAMWORTH FOODS LIMITED

Heard at: Leicester Employment Tribunal

On: 3 April 2018

Before: Employment Judge Dyal

Representation:

Claimant: Mr Feeny, Counsel
Respondent: Mr Finlay, Solicitor

JUDGMENT

1. Upon the Claimant's unfair dismissal, the Respondent shall pay to the Claimant the following sums:

    a. Basic Award: £1,095.12
    b. Compensatory Award: £12,579.42

2. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:

    a. The total monetary award is £13,674.54 (being the Basic and Compensatory award);
    b. The prescribed element is £12,214.42 (being the sum awarded for lost wages before the conclusion of the tribunal proceedings);
    c. The prescribed element relates to the period 3 June 2016 to 2 June 2017;
    d. The monetary award exceeds the prescribed element by £1,460.12.

REASONS

Background

1. At the outset of the hearing today the Claimant confirmed, as she had done in correspondence, that the remedy she sought was compensation only. A few aspects of compensation were agreed between the parties over the course of the day but two important issues remained in dispute.

2. It is important to say by way of preamble that the tribunal's task in resolving the disputed issues has been made a difficult one. The evidence the tribunal was presented with was very sparse and far from entirely adequate:

    2.1. In the case of medical evidence, the best that can be said is that there was some but that it failed to squarely address the issues that really needed to be addressed. As a result the tribunal's findings of fact are at times far less rooted in clear medical evidence that the tribunal would like. The tribunal has simply had to do its best with what it has.
    2.2. The Claimant did not prepare a witness statement dealing with remedy. Instead, she was examined in chief at the hearing but this was not ideal. Her evidence was often confused and confusing, all the more so for being given in this way.

3. For completeness, it is noted that Mr Finlay indicated that despite the lack of a witness statement he was content to proceed subject to the proviso that if something arose that he could not deal with he reserved his right to apply to adjourn. This was a pragmatic approach which the tribunal was grateful for. Mr Finlay went on to cross-examine the Claimant and did not make any application to adjourn.

The basic award

4. The basic award was agreed between the parties at £1095.12.

The compensatory award

5. It is important to start by setting out the following matters:

    5.1. The Claimant expressly (both in her schedule of loss and through counsel at the hearing) limited the period of loss in respect of which she sought compensation to one year from the date of dismissal. The claim for compensation before the tribunal is therefore limited to the period 3 June 2016 to 2 June 2017. This will be referred to as the 'Period of Claim'.
    5.2. The principal head of loss, is loss of earnings. The parties agree that the figure of £317.60 is the figure that should be used to reflect a week's net loss of pay for the purposes of the compensatory award.
    5.3. The parties agreed that loss of statutory rights, the only other head of loss claimed, should be assessed at £365.
    5.4. The tribunal has already dealt with *Polkey* in it's judgment and reasons of 14 February 2018 (sent to the parties on 17 February 2018). In brief, the tribunal's view was that if the Claimant had not been unfairly dismissed, the Claimant's employment would have continued for at least six months. Thereafter, there was a 25% chance that she would have been dismissed had the Respondent acted fairly.

6. In relation to loss of earnings, there are two key issues in dispute: mitigation of loss and attribution of loss.

7. The mitigation issue is simple. The Respondent avers that the Claimant was fit for work during the Period of Claim, failed to make reasonable efforts to find work and if she had done so her loss of earnings would have been substantially reduced. The Claimant's

position is that she was unfit for work through ill-health. That leads on to the attribution of loss issue.

8. The parties' positions developed over the course of the hearing, perhaps in response to case-law the tribunal directed the parties attention to. In any event, by the conclusion of the hearing the tribunal understood the competing positions to be as follows. The Respondent contends that if the Claimant was unfit for work during the period of claim this unfitness was not caused by the dismissal but other matters and so she should not recover compensation for loss of earnings. Alternatively, the Respondent contends that the dismissal was not the sole cause of loss and thus that the Claimant should not recover loss of earnings in full. The Claimant contends that she should recover in full. Mr Feeny initially submitted that if the dismissal was a material cause of the loss of earnings then the Claimant should necessarily recover in full even if there were other causes. However, he withdrew that submission in light of paragraph 12 of *Bruce v Dignity Funerals* [2005] IRLR 189b and accepted that if there were concurrent causes for the Claimant's incapacity for work only one of which was the dismissal then, in principle, a just and equitable reduction of compensation fell to made.

Law

9. So far as relevant s.123 Employment Rights Act 1996 says as follows:

    Compensatory award
    (1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

10. The law in relation to mitigation of loss is clearly stated in *Wilding v BT* [2002] IRLR 524 at [37]:

    (i) It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer; (ii) the onus was on BT as the wrongdoer to show that Mr Wilding had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment; (iii) the test of unreasonableness is an objective one based on the totality of the evidence; (iv) in applying that test, the circumstances in which the offer was made and refused, the attitude of BT, the way in which Mr Wilding had been treated and all the surrounding circumstances should be taken into account; and (v) the court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. I would add under (iv) that the circumstances to be taken into account included the state of mind of Mr Wilding.

11. The law in relation to attribution of loss in case of this sort can be summarised as follows:

    11.1. From *Dignity Funerals v Bruce* [2005] IRLR 189b [11 – 13] the tribunal takes the following propositions:

        11.1.1. Where a loss, such as loss of earnings, is claimed, the tribunal needs to make findings of fact establishing whether or not the loss was caused to a material extent by the dismissal. These findings should cover the whole of the period of loss and different conclusions might be reached in relation to different parts of the period.

11.1.2. If the dismissal was the sole cause of the loss, the Claimant should normally recover in full.

11.1.3. If the dismissal was merely one of two or more concurrent (material) causes of the loss then "in all likelihood" it will be just and equitable too award less than the full amount of the loss.

11.2. From *Trigg v Gabb Robins* [2008] IRLR 317:

11.2.1. In a claim of constructive unfair dismissal damages (whether for loss of earnings or otherwise) cannot be recovered for losses that flow from the employer's repudiatory breach(es) of contract.

11.2.2. Although repudiatory breach of contract is a necessary element of a constructive dismissal it should not for these purposes at least be elided with the dismissal itself, not least because there is already a crystallised cause of action in respect of such breaches and because of the *Johnson* exclusion zone (as discussed in *Trigg* e.g. at [33-4]).

11.2.3. In a constructive dismissal claim the losses that are recoverable are limited to those that flow from the dismissal itself.

12. The tribunal records that the parties made their closing submissions before the lunch interval. During the course of those submissions the tribunal drew the parties' attention to the case-law above and invited further submissions if the parties had any to make after the lunch break. Further submissions were made after lunch and these are reflected in the summary above.

The mitigation issue: findings and conclusions

13. The Claimant made some immediate efforts to mitigate her losses upon her dismissal. She had a contact at an agency, WDS, that supplied workers to Costco. She attended an induction day on 3 June 2016. She was offered a zero hours contract by the agency. Thereafter she worked fairly regular shifts at Costco until 14 July 2016.

14. At some point during this period the Claimant was offered permanent work directly with Costco but could not accept it because it was work in the chiller area. The Claimant has a metal rod in one of her feet and is not suited to working in a cold environment. The Claimant acted entirely reasonably here.

15. On around 14 July 2017 the Claimant's manager at Costco asked the Claimant to move a large and heavy trolley of goods. The Claimant was unable to do so because of her foot problem. The manager was unsympathetic and made a rude comment. The Claimant obtained a letter from a doctor explaining the foot problem. If her mental health had permitted it, she may well have carried on with the agency work had Costco adjusted the work in light of the foot problem. Whether Costco would have done so or not is unclear because the Claimant became unfit for work by reason of her mental health so the matter did not arise.

16. The Claimant's mental health deteriorated in around mid-July 2016 and the tribunal accepts that the Claimant was unfit for work for the remainder of the Period of Claim. The medical evidence before the tribunal does not address this issue as squarely as it ought to. The tribunal's finding is a robust inference drawn from such evidence as there is, particularly the following:

16.1. The tribunal's strong impression based on the Claimant's oral evidence is that following her dismissal she genuinely wanted to work. She would have done so had her health permitted. However, she genuinely felt unable to do so because of her mental health problems from mid-July onwards. The Claimant's early efforts to find work were impressive and provided some corroboration of the tribunal's impression.

16.2. Another aspect of the Claimant's evidence, and this is evidence the tribunal accepts, is that after the Claimant's work with Costco ended she swiftly commenced receiving Employment Support Allowance and continued to do so for a year. ESA is a benefit that is payable to people who are unable to work because of illness or disability. This, it seems to the tribunal, is significant even though not of itself conclusive. Clearly the tribunal is not bound by a third party's assessment of the Claimant's fitness to work, but the fact that she was evidently found to be unfit to work is persuasive.

16.3. There is some further corroboration in the direct medical evidence. For instance:

16.3.1. In a letter dated 2 March 2017, Dr Wood, GP, says that the Claimant's general health deteriorated by July 2016 and the stress and depression reached a level that required treatment with both an anti-depressant and a mild sedative.

16.3.2. When asked in 11 August 2017, the GP's opinion was that stress and anxiety were preventing a return to work. Although this was an opinion about the position in August 2017 and that post-dates the period of claim, it sheds some light on the Period of Claim because there is nothing to suggest that the stress and anxiety condition was substantially different as at 11 August 2017 to how it was during the Period of Claim from mid-July 2016 onwards.

17. For these reasons the tribunal is satisfied that there was not a failure to mitigate loss during the Period of Claim. Initially the Claimant was working and mitigating reasonably; thereafter she was unfit to work.

Attribution: findings and conclusions

18. To start with the tribunal finds that pre-dismissal workplace and other life events were material causes of the Claimant's incapacity for work. There is clearly evidence that the Claimant's health was adversely affected by workplace events and life events that predated and are analytically distinct from the dismissal:

18.1. The Claimant took a period of sick leave certified by the GP as being related to stress between 9 October 2015 and 2 November 2015.

18.2. There are a variety of references to stress (both work and personal) in the Occupational Health reports.

18.3. The letters from the Claimant's GPs in evidence also refer to work stress and undoubtedly this at least in part relates to the pre-dismissal period.

18.4. The Claimant was on sick leave for "stress at work" at the time of her dismissal and had been since 23 May 2016.

19. It is clear that this stress related mental health problem, which at times has been referred to as anxiety and depression, began prior to dismissal and was continuing at the point of dismissal.

20. However, it does not seem plausible to the tribunal that the pre-dismissal events damaged the Claimant's mental health to the extent that she would have been unfit for

work for the entirety of the Period of Claim absent the dismissal. On the other hand it does seem plausible that, and the tribunal finds that, the dismissal was a material cause of the incapacity for work during the Period of Claim. There are a number of factors that render the former implausible and the latter plausible:

20.1. The Claimant's mental health problems had been ongoing for about two years by the date of dismissal and had never by the date of the dismissal led to periods of absence of anything like the length of the Period of Claim. Rather, the Claimant had shown decent resilience levels in that, though she had taken periods of leave, the periods of leave had been relatively short and she had returned to her role thereafter.

20.2. Although, the Claimant was signed off as unfit for work at the time of her dismissal, and the reason for the unfitness was "stress at work" according to the certificate, the period of anticipated unfitness was short being 23 May 2016 to 6 June 2016. This probably means that at the time the GP assessed the Claimant, which was pretty proximate with the date of dismissal, only a short period of absence was anticipated. The tribunal acknowledges that sometimes one certificate of ill-health immediately follows another so the period of absence anticipated in a certificate is not conclusive of anything. However, the tribunal has little to go on and gleans some probative value from the period of absence anticipated in this case by the Claimant's GP, particularly when that is combined with what happened immediately after the Claimant's dismissal.

20.3. The Claimant resigned summarily on 2 June 2016. Immediately following her dismissal, the Claimant was in fact able to find alternative work and to work in a new role until mid-July 2016.

20.4. There was a deterioration of the Claimant's mental health condition in July 2016 and this was temporally proximate to her dismissal.

20.5. The GP letter of 3 March 2017 says "*the ongoing effects from the stress associated with* [1] *the problems she had at [the Respondent] and* [2] *trying to find new work has required further treatment with antidepressants, which she has been treated with again."* I see no reason to read [1] restrictively as a reference only to pre-dismissal events. No doubt it includes those but it is also likely to include the dismissal itself. Dismissal, including constructive dismissal, is a major event and was for the Claimant. It is part of the problems she had with the Respondent. The second aspect, [2], clearly arose in consequence of the dismissal.

20.6. During the Period of Claim, the Claimant became involved in difficult employment tribunal litigation that was principally about her dismissal. In a letter dated 9 March 2018, the Claimant's GP said "*A significant contributor to your recent anxiety and low mood has been the ongoing employment tribunal."* Although the tribunal has quoted just one sentence, in interpreting the meaning of this sentence it has considered the letter as a whole and in context. The tribunal considers it unlikely that the use of the word 'recent' is meant particularly restrictively and that it is likely that the timeframe the GP is referring to includes at least part of the Period of Claim.

21. For these reasons the tribunal considers that the Claimant's dismissal was a material cause of her incapacity for work during the Period of Claim. This is a case then in which there were concurrent causes for the incapacity for work.

22. The tribunal pauses to note that while it is true that the Claimant's health declined at around the time that an adverse comment was made by the manager at Costco (who was unhappy that the Claimant would not move a heavy item), the tribunal does not think

that this is a significant part of the story. Such medical evidence as there is does not attribute the Claimant's mental health deterioration in July 2016 to this event.

23. The tribunal has decided that the dismissal was material to the Claimant's incapacity for work during the Period of Claim; but that is not the end of the matter. Since the dismissal was not the sole cause of the incapacity for work, the tribunal should go on to consider how much of the loss of earnings the Claimant suffered during the period of loss it would be just and equitable to compensate her for.

24. The tribunal considers that one thing that is patently clear is that the Claimant should not be compensated pursuant to s.123 ERA for any loss of earnings that would have occurred in any event had she not been dismissed (whether because of the antecedent repudiatory breaches or otherwise).

25. The tribunal considers it likely that if the Claimant had not been dismissed she would have been unfit for work for *some* of the Period of Claim by reason of ill-health (although as set out above not all of it). The tribunal forms this view for a number of reasons:

    25.1. The Claimant had a significant amount of sickness absence in the pre-dismissal period. This was for a combination of things including:
        25.1.1. Routine illness;
        25.1.2. A chest infection;
        25.1.3. Stress: both personal and work related;
        25.1.4. Absence associated with her foot problem.
    25.2. In late 2015, when the Claimant received a first warning for her sickness absence, she had accrued about 41 days absence for the above reasons in the preceding year.
    25.3. The Claimant had further sickness absence thereafter in the lead up to her dismissal but the exact number of days is not known to the tribunal. There were several periods of absence however.
    25.4. At the time of dismissal the Claimant was in fact signed off work sick.
    25.5. At the time of the dismissal the Claimant's own evidence is that she felt her health was worsening.

26. If the Claimant had not been dismissed and instead her employment had continued during the Period of Claim, it is only fair to anticipate, and the tribunal finds, that the Claimant would probably have had a significant amount of sickness absence by reason at the least of stress related health problems, routine illnesses and from time to time flare-ups of her foot problems. It is impossible to know how many days of sickness absence the Claimant would have had but it is plausible to anticipate that it would have exceeded her company sick pay allowance. She was entitled to four week's full pay in any twelve month rolling period, followed by SSP. At the time of her dismissal she had taken a fair amount of sick leave in the preceding 12 month period although the tribunal does not know the precise amount.

27. Thus it is fair to conclude that the Claimant would probably have suffered some loss of earnings in the Period of Claim by reason of sickness absence even if she had not been dismissed. Therefore, not all of her loss of earnings flow from the dismissal.

28. Since no precise calculation is possible of what loss of earnings the Claimant might have suffered had she not been dismissed that might be a reason to award her loss of earnings in full or alternatively not to award loss of earnings at all. However, the tribunal rejects both courses:

28.1. Firstly, if no reduction were made to loss of earnings, then it is likely that the Claimant would receive compensation for losses that in truth did not flow from the dismissal but from other matters such as the antecedent repudiatory breach of contract. That is impermissible as a matter of law. Such an approach would also overcompensate the Claimant for her unfair dismissal claim and that would not be just and equitable.

28.2. Secondly, to award nothing in circumstances in which there is surely a significant loss but one that is hard to quantify, would also not be just or equitable.

29. Ultimately, the tribunal concludes that the Claimant's loss of earnings during the Period of Claim should be reduced by 10% to reflect the fact that there are concurrent causes for them. It has come to this figure because:

29.1. The reduction is high enough so as to guard properly against the risk of awarding the Claimant compensation for losses that flow from the repudiatory breaches and other non-dismissal matters. Similarly, the reduction is high enough to ensure the Claimant is not overcompensated which would be unjust and inequitable.

29.2. The reduction is low enough to ensure that the Claimant receives the vast majority of the loss of earnings in the Period of Claim in circumstances in which there are sound reasons for not awarding her full loss of earnings.

Calculations

First six months following dismissal	
Loss of earnings less just and equitable reduction of 10% 26 x £317.60 = £8,257.60 £8,257.60 x 0.90 = £7,431.84	£7,431.84
Credit for sums earned in mitigation £791.30	(£791.30)
Second six months following dismissal	
Loss of earnings less just and equitable reduction of 10% reduction 26 x £317.60 = £8,257.60 £8,257.60 x 0.90 = £7,431.84	£7,431.84
Polkey reduction of 25% £7,431.84 x 0.25 = £1,857.96	(£1,857.96)
Loss of statutory rights	£365.00
Grand total	**£12,579.42**

Employment Judge Dyal

Date 05.04.2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS