



EMPLOYMENT TRIBUNALS

Claimant: Miss Molly Phillips
Respondent: Pontcanna Pub Company Limited
On the papers
Before: Employment Judge A Frazer

JUDGMENT ON REMEDY

1. The Respondent shall pay the Claimant the sum of **£6,659.15** in compensation for unfair dismissal.
2. There shall be no Order for costs.

REASONS

Remedy

1. The parties requested that remedy be dealt with on the papers. Having regard to the overriding objective, the relative value of the claim and the need to deal with the matter fairly whilst saving the expense to the parties of an attended court hearing, I determined that it was appropriate for remedy to be dealt with on the papers and I proceeded accordingly.
2. I had the following documents in front of me from the Claimant: a bundle of the Claimant's disclosure as to remedy running to 38 pages; the Claimant's written submissions as to remedy dated 9th January 2019; the Claimant's updated Schedule of Loss dated 9th January 2019 and the Claimant's supplemental submissions as to remedy dated 25th January 2019. On behalf of the Respondent I had before me: the Respondent's submissions in respect of remedy dated 15th January 2019 and the Respondent's supplemental submissions dated 27th January 2019. I also had the Claimant's Employee Tip Declaration Form and an email from the Claimant's new employer detailing an extract from the Staff Handbook for Loungers. I had an email from the new employer regarding the Claimant's tips in her new employment.

3. The Claimant has produced a number of Schedules of Loss. The first such Schedule was dated 7th June 2018 and detailed a basic award of £487.28 and a total (including a compensatory award) of £3,316.69. The second Schedule, dated 19th October 2018, detailed a basic award of £489.65 and a total award of £11, 749.55. The third Schedule, dated 19th October 2018, detailed a basic award of £486.51, and a total award of £16, 579.41. Having regard to both sets of submissions, all of the heads of compensation are in dispute.

Basic Award

4. The Claimant claims a basic award of £486.51 based on a gross weekly pay of £486.51. The Respondent asserts that the award should be £467.50. The Respondent has calculated this on the basis that both parties agreed in the pleadings that the Claimant worked an average 55-hour week at £8.50 an hour. The ET1 and the ET3 are silent on the Claimant's gross weekly pay. Both parties agree in the pleadings that the Claimant worked an average of 55 hours a week but it is not entirely clear as to what reference period this relates.
5. There were no normal working hours for the Claimant and therefore it is necessary to apply the statutory calculation formula in s.222 of the Employment Rights Act 1996. The Claimant's effective date of termination was 29th May 2018. From 2nd May she was absent due to sickness. I have had regard to s.224(3) which states that 'in arriving at the weekly remuneration no account shall be taken of a week in which no remuneration was payable by the employer to the employee and remuneration in earlier weeks shall be brought in so as to bring up to twelve the number of weeks of which account is taken'. Having regard to that section I find that the correct reference period is therefore 1st February 2018 to 30th April 2018. The payslips indicate that after that date (i.e. in May 2018) the Claimant did not receive her normal remuneration. The payments detailed on the payslips for that period are £2173.82 (30th April 2018); £1, 987.88 (31st March 2018) and £2149.88 (28th February 2018). If the total is divided by twelve in accordance with s.224 a 'week's pay' in accordance with the statutory formula is £525 which exceeds the statutory maximum of £508 in s.227. The Claimant was employed for two years and was aged 22 upon dismissal. Therefore her basic award is £508.

Compensatory Award

6. I come now to the compensatory award. The Claimant will have to gain two years' qualifying service in order to bring a claim for unfair dismissal. I consider that it is just and equitable in the circumstances for the Claimant to receive a week's pay for loss of statutory rights, which amounts to £508.
7. The Claimant's net pay on the basis of the reference period above is £415.95. The Claimant commenced employment with Loungers on 1st

June 2018. In this employment the Claimant is salaried and paid a basic salary of £22,500 per annum. Her week's pay in the new employment is £305.30. Her ongoing weekly loss is therefore £110.65 per week. The Claimant is therefore entitled to a sum for immediate loss of earnings of $25 \times £110.65 = £2,766.25$.

8. In my finding the Claimant is entitled to future loss of earnings for a period of 6 months. I note that she worked within the hospitality industry and that within this time period she could reasonably have been expected to mitigate her loss entirely. I therefore award a sum for future loss of earnings of £2,876.90.
9. I have considered the issue of the loss of tips. The Claimant has produced a tips spreadsheet that she photographed from the Respondent's computer. However I am unable to place a great deal of weight on that document. There are no headings and although her name is on the spreadsheet, I am unclear as to what the amounts relate to and for what time periods. The Claimant states that she received tips when she was employed by the Cameo Club and to that end, she filled out an 'Employee Tip Declaration Form' dated 6th October 2016 which stated that she would undertake to declare her tips to HMRC. She has not provided any corroborative evidence of the amount of tips that she earned with the Respondent aside from the spreadsheet, which I have found does not quantify what she earned and over what time period. There is no tax return to HMRC for the tips in question, which would have set out her weekly amounts. If she had had to declare her tips, then it would be reasonable to expect that she would have kept a personal record of them. The Claimant has estimated that she earned £76.85 per week but there is no supporting evidence of this. It is for the Claimant to prove her losses and in the circumstances I do not consider that she has discharged the burden of proving her losses in relation to any tips. Therefore I make no award for this head of loss.
10. I come now to the uplift. Under s.207A of the Trade Union and Labour Relations Consolidation Act 1992, I have a discretion to make an uplift if it appears that the employer has unreasonably failed to comply with the ACAS Code of Practice to which it was subject. Equally I have a discretion to make a reduction if the employee has unreasonably failed to comply with the Code. This case is concerned with the Respondent's handling of the Claimant's grievance. At paragraphs 48 to 50 of the judgment I found that Miss Jones as grievance officer did not conduct an independent or open investigation into the Claimant's grievance. This was a substantive flaw in the handling of the grievance which, I found, went to the heart of the relationship of trust and confidence. The ACAS Code of Practice prescribes the procedure that employers should adhere to when handling grievances in the workplace. I did not find a specific failing on the part of the employer in my reasons which was in conflict with the ACAS Code of Practice on Grievances from paragraphs 32 to 47. I do not find in the circumstances that the Respondent failed to

comply with a part of the ACAS Code of Practice in relation to the procedure for the handling of the grievance.

11. As concerns the Claimant's failure to appeal, paragraph 41 states that where an employee feels that their grievance has not been satisfactorily resolved they should appeal. However given my findings that the grievance officer had evidently not investigated the grievance in a sufficiently open or independent manner and had not given reasons, and my finding that this was a breach of the implied term of trust and confidence, I do not find that the Claimant's failure to pursue an appeal was an unreasonable failure to comply with the Code of Practice in the circumstances. I make no reduction of uplift under s.207A.
12. In conclusion, therefore, I award the basic award of £508 and a compensatory award of £6,151.15. The total award for unfair dismissal is therefore £6, 659.15.

The costs application

13. By way of an email to the Tribunal dated 9th January 2019 the Claimant, via her solicitor, has applied for costs under Rule 76 of the Employment Tribunal Rules of Procedure. This was on the basis that the Respondent had acted unreasonably in the conduct of the proceedings by issuing her with a costs warning letter on 18th June 2018 when she was a litigant in person. The Claimant's representative submitted that as a consequence of having received that letter the Claimant instructed solicitors to represent her in the tribunal proceedings and incurred a consequent legal bill of £8,700 including VAT and Counsel's fees. In addition the Claimant attempted to settle for £3,316.69 but the Respondent rejected this and did not make a counter-offer. The Claimant applied for the Respondent to pay her total costs of £8,700.
14. In the letter to the Claimant dated 18th June 2018 the Respondent's solicitors effectively set out the Respondent's defence in relation to the claim. The Claimant is then put on notice that if she does not withdraw her claim by 2nd July 2018 the Respondent will pursue her for the costs of defending the claim. The letter states that its purpose is to provide the claimant with a reasonable opportunity to carefully consider her position. The claimant was also advised to take impartial advice on the letter in the form of an employment solicitor, the CAB or ACAS.
15. I do not consider that the Respondent conducted itself unreasonably in issuing this letter. The letter sets out the Respondent's view of the claim and its position. The Claimant is then invited to seek advice on the offer, which includes free advice options. The Claimant is also invited to contact the author of the letter if she has any questions. I do not consider that the tone of the letter is high-handed or designed to intimidate. If the Respondent had succeeded at trial and had applied for the costs of defending the claim it would have been open to criticism for not having put the Claimant on notice at the outset. There was nothing improper

about the offer. The Claimant chose to reject it and the case proceeded to trial. It was also a matter for the Claimant as to whether she wished to seek representation for the whole of the proceedings or whether she chose to seek advice merely on the letter.

16. The Claimant also contends that since she settled to offer the case for £3,316.69 and the Respondent did not make a counter-offer she has incurred the costs of continuing the case to trial. The Claimant has now been awarded in excess of the amount that she offered the Respondent and I have considered this as part of my considerations on whether to award costs.

17. In **Anderson v Cheltenham and Gloucester Plc (UKEAT/0221/13/BA)** HHJ Peter Clarke considered the case law in relation to Calderbank-type costs applications in the employment tribunal. The principle distilled from the earlier cases is that the conduct of a claimant in rejecting an offer can be taken into account in determining whether the threshold of unreasonable conduct is met but that a failure to beat the offer will not of itself justify an order for costs in the employment tribunal. The same reasoning must apply to a respondent in a similar position.

18. Having regard to the letter dated 18th June 2018, the Respondent had a strong view of its ability to defend the claim. However, the Tribunal made a final determination on liability after consideration of all of the evidence and documents. There were (as there always are) litigation risks on both sides. The Respondent chose not to militate against that risk and settle the claim. On balance, I do not consider that it can be said that it conducted proceedings unreasonably merely by failing to accept the Claimant's offer. The costs application is dismissed.

Employment Judge A Frazer
Dated: 4 February 2019

REASONS SENT TO THE PARTIES ON
.....16 February 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNAL