Case No: 2600050/17

EMPLOYMENT TRIBUNALS

Claimant: Mrs K Faulkner

Respondent: NHS Business Services Authority

Heard at: Nottingham

On: 15 & 16 February 2018

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Mr E Beever of Counsel
Respondent: Mr J Boyd of Counsel

JUDGMENT ON REMEDY (1)

The judgment of the tribunal is that:

1. The Respondent is ordered to pay to the Claimant compensation for unfair dismissal of £2,155.50 representing the basic award.

2. The Claimant is entitled to loss of earnings for a period of 31 weeks in respect of the compensatory award.

3. The remaining issues as to the calculation of the compensatory award are adjourned to 13 and 14 August 2018.

REASONS

1. This was a hearing on the issue of remedy the tribunal having decided earlier that the Claimant was constructively and unfairly dismissed. The complaint of automatic unfair dismissal by reason of having made a protected disclosure was dismissed.

2. At this remedy hearing the Claimant gave oral evidence on her own behalf. Mr Myles Timpson gave evidence on behalf of the Respondent as he did at the liability hearing. The Claimant was once again represented by Mr Beever of Counsel and the Respondent by Mr Boyd of Counsel. I am grateful to them both for their submissions.

3. Prior to the remedy hearing the Claimant produced a schedule of loss (a 'remedy statement') and the Respondent produced a counter- schedule of loss setting out their respective positions. The Claimant's schedule of loss assesses her compensation at £175,997.62. The Respondent's counter-schedule asserts that the maximum compensation the Claimant should receive should be no more than £25,796.80. It is agreed that the statutory cap for the purposes of calculating the compensatory award under Section 124(1ZA) Employment Rights Act 1996 ("ERA 1996") applies. The maximum compensatory award the Claimant can possibly be awarded is £46,821.00.

4. The Claimant was born on 4 January 1959. She commenced her employment with the Respondent on 30 September 2013. The effective date of termination was 22 October 2016, the Claimant having submitted her resignation on 22 July 2016 with 3 months notice. The Claimant therefore had 3 years' continuous service with the Respondent. It is agreed that her gross salary was £40,964.00 and that her gross weekly pay was £787.76. Both the Claimant and Respondent made contributions to the pension scheme. The *net* weekly pay is not agreed.

5. The following matters are agreed:

   5.1 That the Claimant's basic award should be £2,155.50;

   5.2 That the Claimant should be entitled to a sum for loss of statutory rights at £300.00;

   5.3 That the Recoupment Regulations apply;

   5.4 That following the decision in ***University of Sunderland -v- Drossou [UKEA/0341/16]***, employer's pension contributions should be added to the calculation of a week's pay. There is disagreement as to whether the employee's contributions to the pension should be taken into account.

6. Before her resignation the Claimant began to suffer from stress and anxiety. She went on sick leave on 8 April 2016 and remained absent by reason of sickness until the date of termination. There has not been any finding that the Claimant's absence was caused by the Respondent's conduct. The Claimant did not find alternative employment upon termination and was unemployed. She signed on for Job Seekers' Allowance on 12 December 2016 and received state benefits until 8 April 2017.

7. As part of her eligibility for Job Seeker's Allowance, the Claimant had to be considered as 'actively seeking work'. She registered with four employment agencies and also made applications to potential employers directly. At paragraph 8 of her witness statement the Claimant sets out the jobs she applied for together with the relevant documentation. She applied for a Contracts Manager job with the NHS in July 2016. In November 2016 she applied for two roles, both of them for them being Strategic Principal Transport Co-ordinator roles. She applied for four jobs in December 2016 as Senior Contracts Manager, Head of Assurance and Quality Inspector with the Care Quality Commission and as a Clinical Disability Assessor. In January 2017 she applied for a Paramedic Clinical Advisor role. She applied for five jobs in February 2017 all of them with the NHS or emanations of the NHS. She applied for three roles in March 2017 as Project Co-ordinator, End of Life Service Project Manager and Disability Assessor in a contracting role. In April 2017 she applied for a Public Health Commissioner post in Dudley. On 24

May 2017 she applied for an NHS Commissioning Manager Plan Care Role. That is the last job for which the Claimant has provided any documentary evidence.

8. In relation to the Disability Assessor role the Claimant was invited to a telephone interview which took place on 30 March 2017 and a further interview on 24 April 2017. She completed an online test a couple of days later and was successful in her application. The role is as a self-employed contractor. It involves accessing the Department of Work and Pensions server to download information about the medical condition of applicants seeking Personal Independence Payments. An assessment is undertaken online. Payment to assessors is dependant on the number of assessments completed. The number of assessments offered to contractors can vary. There is no guarantee of a fixed regular or minimum payment.

9. The Claimant was told that she would need to complete a training (induction) course before she could start undertaking assessments. These courses are run twice a year in August and October and last approximately 5 weeks. Candidates are paid during the training process but not in the period between the offer of a role and the training. The Claimant's 'employer' was confident that Mrs Faulkner would be allocated a place on the August course but as it transpired no vacancy was available and she ultimately completed the course in November officially starting her role on 26 November 2017. However that was the week before the hearing in these proceedings and so there was a further short delay. She eventually completed her first assessment on 12 December 2017 receiving payment on 5 January 2018. The period between the Claimant being offered the role and deriving any income from was thus over 9 months.

10. Although we have not seen any documentation, the Claimant's evidence was that she was expecting to be given at least 10 assessments per week. However the numbers are far less. In January 2018 she was only able to earn £540 from assessments offered. In the week immediately before this remedy hearing she was offered only 3 assessments. She considers it unlikely that the work will increase significantly in the near future. She has therefore decided to look for employment elsewhere to provide a decent level of income.

11. The Claimant's training and background is as a Paramedic but now feels that she is too old to work on front-line Paramedic services. She has looked into training courses which would enable her to apply for roles as an Emergency Care Practitioner which would allow her to work in GP surgeries and at minor injury units. That is better paid and is less physically demanding than front-line Paramedic roles. However the training costs of such courses are approximately £10,000.00 which is not financially viable at present or economically worthwhile in the long run given that by the time of the completion of the course the Claimant would be close to her intended retirement date and would not be undertaking the role for very many years.

The issues

12. The issues for this remedy hearing were agreed as follows:
    12.1 In respect of the compensatory award what should be awarded for past and future loss of earnings? This in turn leads to the following related issues;

        12.1.1 If the Claimant had not resigned would her contract of employment have TUPE transferred to

Southern Derbyshire Clinical Commissioning Group ('CCG') in any event?

12.1.2 If the Claimant had not resigned would she have been dismissed by reason of ill health capability in any event?

12.1.3 If the Claimant had not resigned would the Claimant have been dismissed by reason of redundancy?

12.1.4 Has the Claimant failed to mitigate her loss?

12.2 What should be the amount in respect of pension loss?

12.3 What was the Claimant's *net* weekly pay?

13. It was agreed between Counsel that I should initially deal with the first of those issues only because if Mr Beever's primary submissions as to the Claimant's loss were accepted, the Claimant's compensation would exceed the statutory cap and therefore any further arguments as to loss of pension rights would be unnecessary.

14. Although the third of those issues (the weekly net pay) could have been determined at this hearing it now falls to be determined later. The issue arises to some extent following the EAT's decision in ***Drossou***. Mr Boyd (who was one of the Counsel appearing in ***Drossou***) accepts, as he no doubt must, that the employer's contributions must be added to the calculation of a week's pay. However ***Drossou*** does not appear to deal with the question of whether the employee's contributions to the occupational pension scheme should be added in too, on which ***Drossou*** appears to be silent.

15. Given that this issue only became apparent fairly late in the day, and as the parties will need to return on the more substantive issue of pension loss, it was agreed that this issue should be dealt with when the matter returns for the second part of the remedy hearing.

16. Sections 123(1),(2) and (4) ERA 1996, so far as they are relevant, state:

"(1) Subject to the provisions of this section and sections 124, 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.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."

17. The provisions of section 124 ERA 1996 are not relevant.

18. There is no dispute in terms of the applicable law or as to the following legal principles:

18.1 that the question of a failure to mitigate is to be judged subjectively;

18.2 that the proper question for the tribunal is to ask whether the employee has taken *reasonable* steps to minimise her losses;

18.3 that the test is whether the Claimant has acted *unreasonably* (see: ***Wright v Silverline Care Caledonia Ltd [EAT S0008/16]***.

18.4 that the burden of establishing unreasonableness is on the employer (see: ***Wilding v British Telecommunications plc [2002] ICR 1079***.

19. The Claimant does not seek reinstatement or re-engagement. There is no documentary evidence or record of the Claimant applying for any other roles once she had successfully completed all online tests and interviews for the Disability Assessor Role which was on 19 May 2017.

20. I should say that there appeared to some confusion in the Claimant's evidence on whether she continued to apply for any other roles after 24 May. I am satisfied however that she did not given that there are no records of job applications after that date whereas there are careful records of applications before then.

CONCLUSIONS

The TUPE transfer issue

21. Mr Timpson gave evidence that if Mrs Faulkner had not resigned from the CSU she would have TUPE transferred to the Southern Derbyshire CCG. This had been the intention since November 2015. It would mean that the Claimant suffered no loss whatsoever. The circumstances in relation to the discussions regarding the proposed transfer are dealt with in the liability decision in particular at paragraphs 9 – 17 and it is not necessary to repeat them here.

22. Mr Timpson says that the TUPE transfer was simply placed on hold rather than stopped altogether and if the Claimant had not resigned the transfer would in all probability have gone ahead. In support Mr Timpson refers to various items of correspondence which show that even as late as 7 April 2016 there was a commitment to TUPE transfer Mrs Faulkner's employment.

23. Whilst I agree with Mr Timson that the TUPE transfer discussions had merely been put on hold rather than the matter having concluded however what is likely to have transferred, if anything, was the Claimant's reduced role which was infected with the repudiatory breach. I accept Mr Beever's submission that there is no evidence as to what role the Claimant would have had at Southern Derbyshire CCG. No individual from the CCG has given as to what the Claimant's role following any TUPE transfer would have been.

24. In those circumstances, I do not find that a TUPE transfer to Southern Derbyshire CCG would have altered the situation.

The Ill-health capability issue

25. Mr Boyd submits that had Mrs Faulkner not resigned when she did her employment would have ended fairly soon in any event by reason of an ill-health capability dismissal.

26. It is correct to say that Mrs Faulkner was absent for a considerable period of time before her employment ended. She was off sick from around 8 or 9 April 2017. She submitted her resignation on 22 July, some 3 months later. Her employment ended after a further 3 months on 22 October 2016. There was therefore a period of 6 months between the start of her sickness absence and the effective date of termination. During that time the parties were in receipt of occupational health reports which indicated that the Claimant was unlikely to return to work. In a report of 28 August 2016 the occupational health practitioner states that: "*Until the reason is put to bed there would be no change"*. There was no indication or prognosis in August 2016 as to when the Claimant would be able to return to work.

27. The Respondent's policies and procedures on long term absence, as opposed to short-term absences, are not entirely clear. The Respondent has a detailed absence management policy for capability as to short-term absences for which there is four-stage process but Mr Boyd rightly concedes that it does not necessarily apply to long-term absences. As to the latter, the situation is much more fluid and uncertain.

28. It cannot be said realistically, even with a degree of speculation, that the Claimant was at any real risk of dismissal by reason of absence through the capability procedures. The Respondent had not even begun to initiate the capability process at the effective date of termination let alone attempt to invoke it. I do not therefore accept that there was any reasonable possibility that the Claimant would have been dismissed for capability in any event if she had not resigned. It is far too speculative and uncertain to entertain the possibility.

The redundancy dismissal issue

29. Mr Boyd submits that had the Claimant not resigned it is likely that she would have been dismissed for redundancy. It was found at the liability stage that a large part of the Claimant's role had been removed. In line with the proposed changes Mr Boyd submits that redundancy was a real and distinct possibility.

30. This is perhaps the least plausible of all of the possibilities. Mrs Faulkner was never informed that she was at risk of redundancy. There had been no consultation to make her redundant. The submission that she might have been TUPE transferred is inconsistent with a possible redundancy. Whilst the risks of a potential redundancy having regard to the volatile nature of employment in the NHS generally are never too far away, redundancy dismissal in the present situation was not a realistic possibility. In all of the circumstances, I do not therefore find that the Claimant would have been made redundant in any event.

Failure to mitigate

31. The most significant issue at this hearing is whether the Claimant has failed to mitigate her losses having regard to the provisions of section 123(4) ERA 1996.

32. The duty to mitigate does not arise until an employee has been dismissed. Although I am taken to a schedule of jobs at page 446 which sets out various "internal" roles that the Claimant could have applied for (within the wider NHS or related employers) whilst the Claimant was serving her notice, she cannot be criticised for not making any applications for those roles even though the Claimant appears to have given serious thought to some and even thought that she was being interviewed for one of them. However, I do not accept Mr Beever's submission that it would be wrong to expect the Claimant to apply for a role within the NHS after she has found to be constructively dismissed by it. The NHS is a very large organisation with very many offshoots. The Claimant has herself predominantly applied for roles within the NHS following the termination of her employment. It is clear that she did not have any qualms about applying for roles in the wider NHS and other Trusts where she would have no dealings with those responsible for the constructive dismissal.

33. The Claimant's position is that her loss of earnings continued from the effective date of termination (22 October 2016) to a point where she concluded that the Disability Assessor role was financially inadequate. That is a period of 66 weeks at (at least) £697.55 per week. This would mean past loss of £46,038.30 and would take the Claimant to just £783.01 shy of the maximum compensatory award. Her claim as to future loss of earnings, leaving aside any pension loss, is that she is entitled to 12 months of further losses at £2,133.86 per month which is £25,606.32 followed by a further loss of 5 years up to the date of her retirement.

34. Mr Boyd made a concession at the commencement of this hearing that the period for loss should be 40 weeks, thus ending on 24 July 2017. This concession was based upon the assertion that the Claimant's past loss should be extended for two months after her very last job application on 24 May 2017. However, Mr Boyd then sought to withdraw the concession in the light of the Claimant's evidence in cross-examination. An issue arose as to whether Mr Boyd was entitled to withdraw the concession or whether he was bound by it.

35. I shall deal with the last point first. It seems to me that there is no reason why a concession cannot be withdrawn after evidence suggests it was not appropriate to make it. The Claimant's position is not materially prejudiced as a consequence of the withdrawal of the concession. At the end of the day it is a matter for the tribunal to determine the correct compensatory award having regard to the statutory provisions and the applicable legal principles. Notwithstanding the fact that the concession was made with a party represented by Counsel, it seems to me that the decision is ultimately a matter for the tribunal and any initial concession which is withdrawn does not bind the Respondent or the Tribunal.

36. In my view the appropriate period for loss of earnings should be no more than 31 weeks. This is the number of weeks between 22 October 2016 (the effective date of termination) and 24 May 2017. I arrive at that conclusion for the following reasons:

36.1 There is no evidence of the Claimant having made any applications for jobs after 24 May. The Claimant gave slightly contradictory evidence on whether she continued to apply for jobs after that date. Initially she seemed to accept that she did not as no suitable jobs existed after that date for which she could apply. Insofar as the Claimant is suggesting that there were no suitable vacancies that cannot be correct because it is highly unlikely that vacancies within the NHS or elsewhere had suddenly ceased. Then the Claimant appeared to suggest that she was still actively seeking employment from June 2017 to October 2017. However there is no evidence of such applications. The evidence points to the Claimant ceasing

to apply for jobs after 24 May because whilst there are clear records of all jobs applied for before then there is no evidence of jobs applied for after that date. In my view the Claimant unreasonably ceased to apply for jobs after that date when clearly she could and ought to have done so.

36.2 As at 24 May 2017, the Claimant knew she was still a long way away from earning any income from the Disability Assessor role. She knew she still had to attend an induction course which would not be until at least August with a real possibility that it could even be October. She failed to make any efforts to mitigate her loss when she was a long way away from earning anything from the Disability Assessor role.

36.3 The Claimant failed to apply for a reasonable number of jobs following the termination of her employment. She applied only for 2 jobs in November 2016. She made only 4 applications in the whole of December 2016, only one application in January 2017, 5 in February, 3 in March, only one in April and only one in May 2017. To make only recorded application in a month for two consecutive months is in my view unreasonable. Despite the relatively low level of applications the Claimant did not seek to obtain any feedback as to what was going wrong despite her relevant experience in the area and despite the fact that the Claimant was carefully selecting which jobs to apply for. The Claimant applied for only one role during her notice period of 3 months after she had decided to leave. Mr Beever argues that it is the wrong approach to look at the frequency of applications but rather one should consider whether the employee has failed to take such steps (such as turning down suitable new employment, for example) when considering the duty to mitigate. Insofar as it is an example of a failure to mitigate I do not disagree but I do not agree with the submission that the frequency of job applications is irrelevant. An employee who makes very few applications, and hence has fewer chances of securing alternative employment, cannot be in the same position as someone who makes a greater number of applications and makes more effort to find another job.

37. I accept that the Claimant began to suffer from anxiety and stress during her employment with the Respondent from which she did not recover by the date of termination and may not have fully recovered even by now. I made no finding in the liability decision, and in the absence of any medical evidence at this hearing, I am unable to make any finding now that the Claimant's stress and anxiety condition was caused by the Respondent. Mr Boyd suggests that the Claimant's other health scares, which were present around the time of her resignation, may have been a factor in the stress and anxiety. The Claimant denies that and in the absence of any medical evidence I am not satisfied that such health scares caused the stress and anxiety. Her mental state did not seemingly prevent her from applying for jobs post termination. To summarise, the relative scarcity of applications, the failure to continue making job applications for roles that were likely to be suitable roles after 24 May, the fact that the Claimant ceased searching for employment after 24 May at that point the Disability Assessor role (such as it was) was not going to earn her any income for several months down the line are to my mind instances of unreasonable conduct leading to a failure to mitigate. As such the Respondent has discharged its obligation in demonstrating a failure to mitigate after 24 May.

38. Mr Beever criticises the Respondent for failing to put to the Claimant specific vacancies which she could have applied for. It is often the case that employers at remedies hearing produce a long list of vacancies (frequently from agency websites) of

jobs which the successful claimant could have been applied for and to use that as the basis to establish a failure to mitigate. Such an approach is rarely helpful. It is to the credit of the Respondent that it has chosen not to do so.

39. I am invited by Mr Beever to look at the facts rather than to speculate on what might have been. The fact is that there is no evidence of any jobs the Claimant applied for after 24 May 2017. Despite her flexibility in terms of location and role she ceased to apply for any jobs after that date. I see no reason why the Claimant should have a further two months of compensation from 24 May as the Respondent was initially prepared to concede. Her income from the Disability Assessor role was not likely to materialise in those two months. There was no lead-in period for which she should receive credit. It would not have escaped the Claimant's attention that any income from the Disability Assessor role would not be due until September 2017 at the earliest and there was a chance it might not be until much later.

40. For those reasons the period assessed for past loss in respect of the compensatory award is 31 weeks.

41. For the avoidance of doubt I make no award for future loss.

42. The remaining issues as to remedy will be dealt with at the hearing on 13 and 14 August 2018, directions for which are given separately. The parties should take this as notice of that hearing in the absence of any other notice.

Employment Judge Ahmed

Date: 27 April 2018

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE