



EMPLOYMENT TRIBUNALS

Claimant: Dr. F. Carpos-Young
Respondent: Royal Academy of Music

Heard at: London Central
Before: Employment Judge Goodman
Ms G. Gillman
Mr R. Lucking
On: 7 January 2019

Representation

Claimant: Mr M. Lee, counsel
Respondent: Mr. D. Leach, counsel

RESERVED JUDGMENT ON REMEDY

1. The respondent is ordered to pay the claimant £157,488.67, as compensation for victimisation and wrongful dismissal. This includes past and future loss of earnings and pension, injury to feelings, and interest on past loss and injury to feelings. It has been increased by 20% for failing to follow the ACAS Code, reduced by 10% for contribution, and grossed up to reflect the income tax payable on the award in 2018/9.
2. The respondent is ordered to pay £945.54 for failure to allow the claimant to be accompanied at a dismissal meeting.

REASONS

1. In a decision sent to the parties on 14 November 2018 the Tribunal found that the claimant had been dismissed as an act of victimisation, wrongfully dismissed, and should have been accompanied at a meeting. It was also held she had contributed to dismissal by 10%.
2. Today the Tribunal heard from the parties about appropriate remedy. Evidence was heard from the claimant and from Mr. Paul Riddell, the respondent's human resources director. There was a bundle of documents with her applications for posts, and details of posts the respondent said she should have applied for.

3. The parties were agreed on the award for injury to feelings, and on loss to date. The Tribunal must resolve disputes on the right award for future loss, and on whether loss of pension should be calculated on a simple or complex basis. We must also resolve what uplift is right for failure to follow the ACAS Code.

Relevant Law

4. Victimisation compensation must be assessed as loss in tort. It is for the respondent to show there has been a failure to mitigate loss. Any statutory uplift in award must be proportionate overall.

Relevant Findings of Fact

5. The claimant was 58 at dismissal and will be 60 in June 2019. Although there was no default retirement age, she could have drawn a pension in the Teachers Superannuation Scheme (which she had joined on starting work for the respondent) at age 66, and accepts she would probably have worked until then. She had made a decision some years earlier, when she started her doctoral work, to move into academic life rather than continue as a musician in professional orchestras, in the hope of attaining more security and a pension. She had stopped the rigorous practice regime necessary for that career, and does not believe she would now be able to get back her level of performance even if she were to resume practice. The tribunal accepts her evidence on that. She has continued to undertake other performance work, as well as individual instrumental tuition, and remains with the agencies where she is registered for both areas of work. Historically she undertook instrumental teaching at schools outside London, but that has not been for some time. It was suggested that she should have applied for a job at a school on Haywards Heath, but she points out that it is for 2 hours a week at £20 per hour, and will not meet the cost of travel. She has not been able to increase to any real extent the amount of this work. The value has increased slightly; the claimant says this is because the Christmas season is always busy but otherwise business will be slack until the round of Easter Messiahs. On tuition, she says the limiting factor is the number of bassoons a school has for loan, given the high cost of an instrument.
6. The claimant does not have a music degree; her qualifications are in performance. Her PhD is in sociology of music. She does not have experience of teaching performance to a group, in conducting an orchestra or a choir, or of teaching academic music in a class; she cannot teach composition, and has no skills in music technology. As we understand it, while she taught individual bassoon pupils what is needed to pass the grade 5 theory required to progress to grades 6 to 8, she is not able to teach music at GCSE or A level, or at least has no experience of that, which restricts the advertised teaching roles she can apply for, even in independent schools which may not require a formal teaching qualification. She has done some examining of bassoon players for the Guildhall, now Trinity Board, but when she applied for work at Associated Board some years ago she could not satisfy the requirement to test general musical ability as she could not play the piano to an adequate standard, so there is no scope for increasing her income in that direction.
7. Her academic role has been confined to the 2 months in post at the Academy, and occasional assistance at Westminster University. She has presented papers, but has no record of publications, a handicap in obtaining

university teaching.

8. Her best hope of employment in the music field therefore is in the conservatoires. The academic recruitment round is largely from February to May, to start in September. In 2018 she applied for six posts in London, and was not shortlisted for any of them. It is not known what may come up this year. It is possible, but no more than that, that there may be a professional development role at the Guildhall. There are four conservatoires in London (including the respondent) and the claimant agreed she could also travel to Birmingham if a post came up there, although Manchester, Leeds and Cardiff are too far to be realistic, as she has to supervise the care of her severely disabled mother who is in London. Music is taught in some other HE and FE colleges – we saw advertisements for posts in West London and in Croydon – but the requirement for knowledge of digital technology suggests that they are not focused on classical music.
9. There are a few administrative roles in institutions teaching music and other performance such as University of the Arts. The claimant has not applied for any in 2018. We thought she may have been hasty in dismissing them. For example, a post at the Royal College of Music for administration was rejected because it was for the department of composing and conducting, but the job description did not suggest the administrator was required to know much about composition or conducting. Such jobs were advertised at lower rates: the RCM post in range £25,904-£28,664, against the £34,500 (FTE) paid for her role with at the respondent. A post for a charity encouraging school students to apply to university was advertised at £23,000 FTE. A temporary part-time student support officer (largely a clerical role) was advertised as temporary and part-time at £15.38 per hour. There was a post in digital marketing for an orchestra at £25,00- 28,000 for 12 months.
10. She has recently applied for a one-year fixed term contract post as Student Life Officer at the Guildhall School, for 21 hours a week at £34,2390 to £38,730 FTE according to experience. The outcome is unknown. This seems to be the only administrative role at comparable pay to the job she held with the Respondent.
11. The claimant asserts she is handicapped in her search for work in the close knit work of classical music by the fact of dismissal and the tribunal claim. We did not accept her recent evidence that she was told by telephone that she was not shortlisted in this year's academic appointments because she was viewed as "toxic" because of her dismissal. We do however credit that, fairly or not, it is something that employers take into account, concerned that such individuals may be troublesome. Mr Riddell conceded as much from his experience in previous areas where he had worked, though he added he had not heard it in his current post. We know from the circumstances of the claimant being asked to resign as a governor of the RSM (see reasons for liability decision) that influential people in classical music appeared to have made a decision about her without investigation of facts. In our collective experience there are many employers who on hearing that someone has made a tribunal claim after being dismissed for gross misconduct will not read the decision, or even if they do, will conclude there is no smoke without fire. The dismissal and the tribunal claim were widely reported. Internet searches will bring up the story for some time. The decision may vindicate the claimant, but gossip is powerful and unfair. Our view is that it is a factor likely to put the

claimant at a disadvantage in a small and tight labour market. If it is not a reason why she has not been shortlisted for any post in 2018, when in 2017 she had been so successful, it shows how very competitive the market is, and how difficult it is to get a job, even if well qualified. The fact that she has been dismissed, and forced onto a difficult market, puts her at a disadvantage, and while time will increase the number of posts she can apply for, in each successive year she will then have been out of the labour market for longer, and with an increasing gap in her CV to explain. The claimant was criticised for mentioning her dismissal in slightly combative terms in her 2018 job applications, but Mr Riddell conceded she would have to offer some explanation for the early termination by the respondent, and though he thought it could have been done more blandly, misconduct can be difficult to explain away, even with a favorable tribunal decision.

12. Mr Riddell also gave evidence that following the claimant's departure the respondent had reassessed their need for professional development and had reassigned some roles to existing staff and cut the two 0.6 posts to 0.4. There were no documents, not a single allusive email, evidencing these decisions. It was suggested by Mr Riddell that even without the dismissal the claimant's role would not have been confirmed at the conclusion of probation, and there was a 40% chance she would have been dismissed in any event. We did not accept that there would have been a restructure if the claimant had not been dismissed when she was. More likely such changes as were made were consequential on the need to manage the role after she left; had she not been dismissed there is no evidence changes would have been made.
13. We concluded that the claimant's chances of getting a similar academic post to that she held with the respondent are so low as to be nil. There are only five institutions which might have posts. The posts are new in concept and not typical. She was lucky to get the post she did. She is at a disadvantage because of the dismissal, however unfair this is. She has failed even to be shortlisted for similar jobs in the current year. The longer she is without such work, the more difficult it is likely to be, though she could perhaps manage to fill the gaps with administrative work. It is not realistic to hold that she will find any similar role before retirement age.
14. We do anticipate she has better prospects if she widens her net to take in administrative work. We hold it reasonable to have focused on the conservatoire posts in 2018, but it would be reasonable now to look at administrative posts in the field of music. This is still a crowded field, but her varied experience may be an advantage compared to recent graduates. Difficult though it is to make an accurate assessment, on the evidence that such posts are available at wider range of institutions, we expect her to have found some regular work by the start of September 2020, though there is likely to be a partial loss of earnings when she does. There is meanwhile little scope for drumming up additional performance or teaching work to mitigate the loss of her 3 day a week post.

Calculations

15. On that basis, we make the following calculation. Her net monthly pay was £1,499.09. From dismissal to the remedy hearing is 61 weeks, so the loss to date is £21,102. From this are deducted the payments for the appeal period of £1,192.17, so 19,910.20 net. No reduction is made for other earnings as they

are at about the same level as she would have earned had she not been dismissed from her 0.6 job.

16. For future loss, there is another 20 months of loss (to September 2020) at £1,499 per month: £29,981.
17. Thereafter, the difference in FTE salary varies from nil (the Guildhall post) to £8,000 (the RCM post), £8,500 (digital marketing) to £10,500 (school support officer). Applying the part-time hours (0.6) gives a range from nil to £4,000, £5,100 and £6,300 gross per annum. As a measure of this partial loss the Tribunal takes a figure of £5,000 gross per annum. Applying deductions for basic rate tax (20%) and employee national insurance (12%), the loss from September 2020 to retirement in June 2025 runs at £3,400 per annum. Using the table A6 for deferred loss from the PNBA 2018/19 Facts and Figures, the multiplier for a period starting in 1 year 8 months, and lasting for a little under 5 years, discount rate -0.75, is 4.81. The future partial loss therefore is $£3,400 \times 4.81 = £16,354$.
18. The total future loss of earnings, full and partial, is £46,335.

Pension loss

19. The claimant was a member of TPS, a defined benefit scheme. Unusually for these days, most of the alternative posts still carry membership of one such scheme or another, whether TPS for teaching, USS or LGSS for administration. Given the financial advantages of a defined benefit scheme, and how close the claimant is to retirement, we considered it right to follow the complex method to achieve just compensation for loss.
20. On the assumptions made so far, the claimant is likely to be out of TPS membership as a result of dismissal for 2 months short of 3 years. Her benefit on retirement would have been a pension of $1/57$ of each year's gross salary and assuming no pay rises, so $£34,500 \times 0.6 \times 34/36 \times 1/57 = £343$ per annum. Taking a multiplier at discount rate -0.75% from the table in appendix 2 of the Employment Tribunals Pension Principles document for a woman aged 59, retiring at 66, it is 26.9. The loss of TPS pension is then £9,267.
21. Thereafter there is a small loss, related to the partial loss of earnings in administrative work, and the possibility she may be in a more generous scheme (LGSS, $1/49$ earnings) or less (USS $1/75$ earnings). Taking a mean (between the two possible schemes) pension on £5,000 gross per annum of £84, multiplied by $58/12$ (4 years 10 months) in the scheme, the loss on retirement is £406 per annum. Applying a multiplier of 26.90 from retirement age, that loss is worth £10,921.
22. In both cases the amount in question is likely to be below the annual tax threshold when the pension is in payment, even if the claimant is also in receipt of basic state pension, now £6,549 per annum.
23. There was no evidence to suggest that the claimant would not have continued in part-time employment until retirement age, and as stated we do not accept there would have been a failure to confirm her probation had she not been dismissed. There is nothing to suggest she is not in good health, and future redundancy or funding changes at the Academy have not been argued. Nevertheless, the claimant proposes a discount for the risk she would have

left the pension scheme before retirement of 15%. That reduces the sum of the two pension awards, £20,188, to £17,160.

24. Interest is to be calculated on the loss of earnings to date at 8% from the mean point, so 30.5/12, and is £464.50.
25. The future losses are £63,495 (loss of earnings £46,335 plus pension losses of £17,160).
26. The total past loss, interest on past loss and future loss including pension is £83,870.70.

Injury to Feelings

27. The agreed award is £15,000. To that is added 8% interest from the dismissal 14 months ago, £1,400.
28. Added to the past and future loss of earnings and pension that brings the total to £100,270.70.
29. By virtue of the amendment in section 5(7) of the Finance (No 2) Act 2017 the injury to feelings award is now taxable in 2018/9.

Increase for breaches of ACAS Code on Discipline and Grievance

30. The claimant was allowed to appeal the decision, but as set out in the liability reasons the respondent failed in every other respect to follow the Code, which is not restricted to those who have two years qualifying service. She was wholly unaware that her job was on the line, or that she was being investigated for misconduct, or what the misconduct might be. Even if the respondent wanted to act quickly when faced with rapid escalation by students, there was no reason not to (say) suspend and give the claimant time to consider what to say or understand the position. It was not a technical breach. Under section 207A of the Trade Union and Labour Relations Act as amended we can increase the award by up to 25%. Conceding that the claimant did have an opportunity to appeal the decision, the only stage of the Code the respondent followed, we increase the award by 20%.
31. Applying an increase in award of 20%, and a reduction for contribution to dismissal of 10%, the final award of £100,270.70 is increased by 10% to £110,297.77.

Failure to be Accompanied

32. It is not in dispute that the award is 2 weeks' pay at £472.77 gross (inclusive of employer pension contribution), so £945.54.

Grossing Up for Taxation

33. The purpose of compensation is restitution, to put the claimant in the position she would have been but for the wrong. Assuming the victimisation award is paid in tax year ending April 2019, and that her casual earnings from teaching and performance in that tax year are £8,298 (adjusting the £9,681 in the schedule, as it was earned over 14 months), those earnings are within the nil

rate band, currently £11,850. The first £3,532 (11,850 – 8,298) of the award will be free of income tax therefore.

34. The next £34,500 is taxed at 20%. So the sum to award to put the claimant where she would have been but for basic rate tax is $34,500 \times 100/80$, £43,125 (addition for basic rate tax, £8,625). The amount of the award falling into the higher rate tax band is £110,297, less £3,532 (tax free) and £34,500 (at 20%), so £72,265, but will also now have to include the addition for basic rate taxation, 8,625, so the total taxable at 40% is £80,890. Of that 30,000 can be discounted as within the statutory concession. Dividing £50,890 by 60 and multiplying by 100, the amount required to leave the claimant £50,890 in this band is £84,816.67.
35. Adding £3,532 (nil rate), plus £34,500 (20% band), plus £84,816.67, plus the £30,000 tax free the total award for victimisation is £152,848.67. However, as income over £100,000 reduces the personal allowance pound for pound, the claimant will by virtue of the award now have to pay tax at 40% on £11,600 of her income, even allowing for the statutory concession. It is necessary to add a further £4,640 to achieve restitution, bringing the total award grossed up for tax liability to £157,488.67. As £30,000 of this is not taxable, it is fortunately not necessary to adjust the award for the 45% rate payable over £150,000, even taking the claimant's other income into account.

Employment Judge Goodman

Date 11 January 2019

JUDGMENT SENT TO THE PARTIES ON

14 January 2019

FOR THE TRIBUNAL OFFICE