



2. It is recorded that the Employment Protection (Jobseeker's Allowance etc) Regulations 1996 do not apply to any part of this award.

## **REASONS**

1. The Claimant was dismissed from her employment with the Respondent on 18 January 2018. At the time of dismissal, she was aged 27. She received a weekly salary in the sum of £2,411.61 per month gross; and £1,915.37 net. There were no other supplemental benefits.
2. Following a hearing on 10 September 2018 and 19 October 2018, the Tribunal found the Claimant had been unfairly dismissed. It further concluded there was a 50% prospect the Claimant would have been dismissed following a fair procedure in any event.
3. For the purposes of the remedy hearing, the parties presented a supplemental bundle extending to some 45 pages. The contents included a further witness statement from the Claimant, together with an updated schedule of loss. The Claimant also provided copies of the P45 forms received following termination of her subsequent employments.
4. Having heard the evidence of the Claimant, the Tribunal makes the following additional findings:
  - 4.1 At the time of her dismissal, the Claimant was and remains a single parent and primary carer for her son; aged 7. The demands of her childcare commitments directly influenced both the location of any prospective employment and the hours of work which she might be able to fulfill. These factors meant that the Claimant was required to limit her commuting distance; with the result that she was prepared to consider employment opportunities within a 10 mile radius of her home;
  - 4.2 The Claimant initially commenced her search for employment within the childcare and related sectors. She also sought to embark upon a new business in acrylic nails and/or manicuring. She undertook and completed a course of qualification to enable her to pursue this interest. It was her intention that this should be in parallel to her continued search for substitute employment. By February 2018, the Claimant had participated in two recruitment processes. In both, she nominated the Respondent as a relevant referee. One post was within the child care sector, the other was not. As is noted in what follows, the reference provided by the Respondent in connection with the care role, made reference to a safeguarding concern. The second application related to the position of receptionist. In response to that request, the Respondent provided a factual reference, reciting the

dates of employment but making no mention of the fact of dismissal. As at February 2018, therefore, the Claimant was aware that the detail of the reference provided by the Respondent was dependent upon the role for which the Claimant had applied. In short: whether there was a continuing obligation upon the Respondent to mention the concerns in which the Claimant, and others, had been implicated depended upon the post for which she had applied;

- 4.3 The Claimant registered with the Job Centre recruitment portal: "In Deed". The only filter she applied to her expression of interests was the geographical radius of 10 miles from her home. This prompted an auto generated daily report. The Claimant suggests there were only 5 posts presented daily. Given the lack of filter references utilised by the Claimant, the Tribunal considers this to be unlikely and that, in reality, the Claimant's reference is to those posts in which she might have a potential interest. In the period January 2018 to February 2018 the Claimant applied for a total of 5 posts on line. They were across a range of sectors. However, despite her level 5 qualification, she considered a lack of experience in other care sectors, undermined her applications. She did not copy or retain any of the applications which were made, or, collate any correspondence to indicate the outcome of the applications themselves;
- 4.4 Ultimately, the Claimant's searches secured an interview for the position of Residential Care Worker with Care Mark. At the time of her interview for that post, the Claimant was asked about, and disclosed, the reasons for the termination of employment with the Respondent. The application appears to have faltered at that stage;
- 4.5 In February 2018, the Claimant secured employment with Yorhealth Ltd. This was in the role of healthcare assistant. She confirms that she participated in an interview and selection process. She also underwent 2 weeks training for the post. Employment with Yorhealth commenced on 14 February 2018. The Claimant confirmed (and the Tribunal accepts) the salary was calculated at the national minimum wage. However, on 28 February 2018, the relationship was terminated by her then employer. The reasons are detailed within the letter of 24 March 2018 [p4]. Three grounds are relied upon, two of which relate to the quality of the reference provided by the Respondent. The third suggests that the Claimant had failed to demonstrate the necessary candour during the interview process relative to the termination of her employment with the Respondent. The Claimant denies that this is the case. The Tribunal is satisfied that the principal trigger for the termination of employment was the content of the reference provided by the Respondent;
- 4.6 The termination of the appointment with Yorhealth Ltd, prompted the Claimant to conclude that her prospects of securing alternative employment in the sector for which she was qualified were slim. Given her experience, and the need for satisfactory references and

statutory clearances, the Tribunal is satisfied that this was a reasonable conclusion which reflected the realities with which she was confronted;

- 4.7 Having commenced her claim before the Tribunal, the Claimant concluded that short of a favourable decision, these realities were unlikely to change. As a result, she sought lesser paid employment outside the sector. She applied for a further 10 posts and registered with Recruitment Agencies. This led to an interview at Yorkshire Bank, Leeds. This did not generate any further interest. Despite this, the Claimant was unable to secure employment in the period February 2018 to June 2018. The Respondent contends that this was due to a lack of effort on the part of the Claimant and indeed, points to a number of managerial positions which were within the Claimant's capability. The Tribunal is satisfied that there were posts available of a general managerial kind which were open to those with management experience from other sectors. The Tribunal is also satisfied that these posts could have accommodated the Claimant's travelling requirements;
- 4.8 In June 2018, the Claimant sought and obtained a position in a local public house as a manager of the Pear Tree Inn. This post was secured following an informal approach to a local landlord of a tied house. This culminated in an offer of permanent employment. The documentation confirms that the Claimant commenced this employment in or about June 2018. In February 2019, the Claimant chose to resign from that employment and did so with effect of 6 February 2019. There is no suggestion that the Claimant made any further applications for employment in the period June 2018 to February 2019;
- 4.9 During her employment with Yorhealth, the Claimant earned a total of £527. Her gross pay whilst in the employment of the Pear Tree Inn, amounted to £7918.86. The payslips indicate an average amount of £250 per week, net; and
- 4.10 Since the promulgation of the Tribunal judgment, the Claimant has been working with a job coach at Halifax job centre plus. She considers that the prospect of employment in that sector is slight and suggests that it will take her up to 2 years to obtain a comparable position in the childcare sector. The Tribunal accepts that subject to the issue of appropriate references, it will be some time before the Claimant could hope of securing a managerial position in the childcare sector.

**Submissions on behalf of the Claimant**

5. On behalf of the Claimant, it is submitted that she has suffered financial loss to date totalling £14,538.58; being the difference

between the sums earned and received since leaving her employment with the respondent and the net monthly income to which she was previously entitled of £1915.37. The Claimant also contends that it will be a further 2 years before she is able to secure anything like a comparable position to that enjoyed with the Respondent.

6. Further, the Claimant rejects any suggestion that she has failed to mitigate her losses by reason of the fact that she could and should have made applications for posts of a managerial kind outside the care sector. In simple terms, the Claimant contends that she applied for those posts which she considered were unlikely to require or generate a negative reference from the Respondent. This meant she was able to secure some employment as opposed to none.
7. The Claimant invites the Tribunal to award her full losses, and make a significant award to remedy the continuing impediment she faces in seeking to re-establish herself in the care sector. Further, she invites the Tribunal to reject any suggestion of contributory conduct and award a 25% uplift to the compensatory award.

**Submission on behalf of the Respondent**

8. The Respondent does not seek to challenge the difficulties and limitations which confronted the Claimant in connection with her domestic and child care commitments. However, it submits that the Claimant has failed to take any reasonable or adequate steps to mitigate her losses. In this respect, the Respondent points to the wider managerial roles for which Claimant could and should have applied and the transferability of her management experience. In this respect, the Respondent points to the fact that the Claimant was – as early as January 2018- aware of the fact that the obligations operating upon the Respondent concerning provision of a reference varied in accordance with the role for which application was made and the reference required. This says the Respondent, ought to have alerted the Claimant to the fact that the way was clear for her to apply for such roles. It is said that the financial consequences of the Claimant's failure to do so to do so, ought not to be laid at the door of the Respondent.
9. More specifically, the Respondent submits:
  - 9.1 The basic award ought to be subject to a finding of contributory conduct within the meaning of section 122 of the Employment Rights Act 1996. For this purpose, it places reliance upon the allegations of misconduct which were levelled against the Claimant within the disciplinary process and the responsibility which the Claimant had not only for herself, but also for the failings of those working under her supervision;

- 9.2 The Tribunal should decline to apply any uplift to the compensatory award on account of the fact that the procedural deficiencies identified within the course of the liability judgment were not intentional; and
- 9.3 There should be no award in respect of historic or future loss of earnings since such loss, if any, is wholly attributable to the Claimant's failure to mitigate such losses and/or it is not just and equitable to award such compensation.

### **Discussion and Conclusions**

#### Basic Award and Loss of Statutory Rights

10. As at the effective date of termination, the Claimant was aged 27. The basic award has been correctly identified within the Respondent's counter schedule in the sum of **£1467**. The question arises whether this amount should be subject to reduction pursuant to **section 122 of ERA** by reason of the culpable contributory conduct on the part of the Claimant. For practical purposes, the Respondent relies upon the allegations of misconduct levelled against the Claimant within the disciplinary process.
11. There is a superficial attraction to this submission. However, in the view of the Tribunal, it is important to keep in mind that the Claimant was implicated together with her line manager. Whilst it may well be the case that they shared some common accountability, the apportionment of responsibility (and culpability) are different matters. This being so, the issue of contributory culpable conduct of the type required to make a finding of contribution calls for some caution. Upon this basis, the Tribunal is unable to conclude that the Claimant was in fact guilty of culpable contributory conduct.
12. The issue of loss of statutory rights was a matter which the parties left to the discretion of the Tribunal. In the view of the Tribunal, the appropriate figure in respect of this head of claim is **£125**. This sum is subject to the reductions detailed in what follows.

#### Compensatory Award

13. Section 123 of the Employment Rights Act 1996 makes clear that the issue of compensation is a matter for the discretion of the Tribunal. The exercise of this discretion requires the Tribunal to determine the question of compensation, having regard to the losses sustained by the Claimant, upon the basis of what is just and equitable in all of the circumstances of the given case. As such, it is necessary for the Tribunal to identify the level of loss actually sustained by the Claimant by reason of the act of dismissal.

*Has the Claimant suffered any financial loss?*

14. It is not disputed that the Claimant was, during her employment with the Respondent, in receipt of a net income of £1915.37 per month. Issues of failure to mitigate aside, therefore, the loss sustained by the Claimant in the periods of January 2018 to May 2018 and June 2018 to February 2019 represent £9576.85 and £13,407.59 respectively. From these sums, credit must be given for £527 and £7918.86 in respect of the same periods.

*Is the Claimant's loss attributable to the dismissal?*

15. In answer to this question, the Respondent points to the obligation upon the Claimant to take reasonable steps to reduce the losses to which she might otherwise be exposed by reason of the dismissal. The duty to mitigate has long been recognised as imposing a clear obligation upon the Claimant to take reasonable steps to ameliorate her losses. It is for the Respondent to satisfy the Tribunal on the balance of probabilities that the Claimant has acted unreasonably and failed to discharge that duty.
16. In this respect, the Respondent has pointed to a handful of posts which, it contends, could and should have been identified and pursued by the Claimant. In the view of the Tribunal, in and of itself, this would be insufficient to establish a failure to mitigate on the part of the Claimant. However, it is clear that the conduct in which the Claimant was implicated served as a very real impediment to continued participation in the child care sector. As an experienced manager, and the holder of a specialist qualification, the Claimant would and should have been aware that the matters of concern which she and her colleagues were implicated triggered reporting obligations to the Local Authority Designated Officer (LADO). Further, as an experienced manager in this highly regulated sector, the Claimant ought to know and appreciate that her managerial participation in this sector was severely limited and would continue to be so.
17. The Tribunal is satisfied that this thought process did in fact operate upon the Claimant and led to the recognition that she was required to look for management elsewhere. Having done so, however, she confined herself to the appointment at a public house. During the period which followed she made no further application for an alternative managerial position; choosing instead to confine herself to a minimum wage position. In the period spanning February 2018 to May 2018, the Claimant made a total of 10 or so applications. She made no further applications thereafter, save for the informal approach made to the landlord of the public house to which she was appointed manager.
18. In the view of the Tribunal, it was reasonable for the Claimant to come to the conclusion that she could not realistically apply for child care sector appointments at management level. It was not reasonable for

her to fail to pursue other managerial positions outside of the child care sector. In consequence, the Tribunal is satisfied that the Claimant failed to mitigate her losses from in or about June 2018.

*Is it just and equitable to award compensation to the Claimant?*

19. This question requires the Tribunal to have regard to all of the circumstances of the case. Having done so, it must give careful consideration to the actual loss suffered by the Claimant. However, this is not determinative. It is but one factor. Having regard to the history of this matter, the nature of the role occupied by the Claimant, the volume of evidence held by the Respondent and the heavily regulated sector in which the Respondent participated, the Tribunal is satisfied that the demands of section 123 are met in the award of compensation calculated as follows:

Loss of earnings (January 2018 to May 2018)	£9576.85
Less sums received	£527.00
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	£9049.85
Uplift (@25%)	£2,262.46
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	£11,312.31
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Less Polkey reduction	(£5,656.15)
To which should be added:	
Loss of Statutory Rights	£125
Basic Award	£1467
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Total payable:	<b>£7248.15</b>

10. Judgment is to be entered for the Claimant accordingly. It is recorded that the Recoupment Regulations do not apply to any part of this award.

Employment Judge Morgan

Date: 11 April 2019



