



EMPLOYMENT TRIBUNALS

Claimant: Dr Jane Ben-Shah

Respondent: Lushington Chiropractic Limited

Heard at: London South **On:** 8 March 2019

Before: Employment Judge Fowell

Representation:

Claimant: Mr P O'Callaghan, instructed by RSR Law

Respondent: Mr B Large, instructed by RBS & Natwest Mentor

JUDGMENT ON REMEDY

1. The claimant is awarded compensation as follows:

| | |
|---|-------------------|
| a. for automatically unfair dismissal | £15,169.19 |
| b. for breach of contract in respect of holiday pay | £4,271.18 |
| c. Total | <u>£19,440.37</u> |

REASONS

Introduction

1. Further to the judgment on liability following the hearing on 18 September 2018, consideration was given at this hearing to the assessment of the claimant's compensation.
2. Detailed calculations are set out in the Annex attached and were the subject of submissions at each stage during the course of the hearing.

3. The first point to establish was the claimant's net weekly rate of pay. The figure of £460.02 per week reflected her gross annual salary of £30,000 at the date of dismissal.
4. Consideration was given to Dr Ben-Shah's subsequent earnings from 2 December 2017, which were on a self-employed basis. She received 50% of the gross fees she generated and the figures for each month were considered and averaged. The result of that exercise was to show that the total earnings in question were £25,193.73. Further, this reflected gross annual average earnings of £24,221.64, which in turn amounted to £1654.22 net per month.
5. In assessing the period of future loss, Doctor Ben-Shah give evidence that she intended to stay in her present position, but hoped to apply for indefinite leave to remain in the United Kingdom in May 2019, and in due course to establish her own practice. Given that her present earnings showed no pattern of improvement towards her previous level of earnings and given that this state of affairs is therefore likely to continue for the foreseeable future, the figure of six months future loss advanced in her schedule of loss was accepted.
6. Evidence was submitted about expenses incurred in consequence of her dismissal. By agreement, her moving expenses were £246. She has incurred storage costs £12 per week and I allowed 52 weeks for those costs rather than the full amount claimed. From this was deducted £36 which appear to relate to an extra charge for extracting certain items for sale. The final item was for £1642 for the costs of a further application for a Visa, having lost the sponsor for her previous Visa.
7. On that basis the losses for her complaint of unfair dismissal were:
 - a. Prescribed element £9,155.75
 - b. Non-Prescribed element £6,013.44
 - c. Total £15,169.19
8. There was also a complaint of failure to pay holiday pay. Although the list of issues presented at the previous hearing advanced claim based on the Working Time Regulations 1998, that approach limited the compensation available because of the requirement in those Regulations that leave be taken in any given year and only rolled over to another year in limited circumstances. The contract of employment in question provided for 5.6 weeks holiday per year, in line with the Regulations, and in accordance with established practice, in a situation where the failure to pay holiday pay was an ongoing state of affairs, accruing from month to month, no time limit issue arose over claiming holiday pay for the entire period of Dr Ben-Shah's employment.
9. That employment involved three different salaries, reducing from £56,000 per year to £30,000 per year and so each period was considered. The length of each period was used to calculate the pro-rata holiday entitlement; evidence was then heard about the number of days actually taken as holiday during those periods, including on bank holidays; and the appropriate net daily rate of pay applied.

10. In general, Dr Ben-Shah was required to work even on bank holidays, unless the clinic was closed. The only such date identified it was Christmas Day 2017, and there were four further days of paid holiday, two during the first period and two during the second period.
11. The result of those calculations was the sum of £4271.18, and hence the total compensation amounts to £19,440.37.

Employment Judge Fowell

Date 9 March 2019