



EMPLOYMENT TRIBUNALS

Claimant: Ms S M Brennan

Respondent: Newbarn Ltd

HELD AT: Manchester

ON: 15 July 2019

BEFORE: Employment Judge Slater
Mr R W Harrison
Ms S Khan

REPRESENTATION:

Claimant: In person, assisted by Dr N Carmichael, lay representative
Respondent: Mr S Lewis, counsel

JUDGMENT having been sent to the parties on 16 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a remedy hearing following a reserved judgment on liability sent to the parties on 17 May 2019. We found that the claimant had been constructively unfairly dismissed and that her dismissal without notice was a breach of contract. This judgment should be read in conjunction with the findings of fact made in our judgment on liability.

2. The claimant had, in her claim form, ticked the box to indicate that she was seeking compensation, if successful, and not reinstatement or re-engagement. In the schedule of loss prepared before the initial final hearing, the claimant did not express interest in reinstatement or re-engagement. Neither did she express interest in reinstatement or re-engagement during the preliminary hearing or initial final hearing. Shortly before the remedy hearing, after taking legal advice, the claimant, in written submissions sent on 8 July 2019, made an application for reinstatement or re-engagement.

3. The claimant objected to the respondent putting in a witness statement for Lynn Collins which was only sent to the claimant on Friday 12 July 2019. The

tribunal considered it in the interests of justice that the tribunal hear this evidence, which was in response to the claimant's application for reinstatement or re-engagement made on 8 July 2019.

The application for reinstatement or re-engagement

4. We considered first whether to award reinstatement or re-engagement as requested by the claimant.

5. Reinstatement or re-engagement is a remedy which may be ordered by the tribunal for unfair dismissal. Section 112 Employment Rights Act 1996 provides that, where the tribunal has found a complaint of unfair dismissal to be well founded, and the claimant expresses a wish for the tribunal to make an order for reinstatement or re-engagement, the tribunal may make such an order under section 113. Section 116 sets out provisions relating to the choice of order and its terms. Subsection 1 provides that, in exercising its discretion under section 113, the tribunal shall first consider whether to make an order for reinstatement and, in doing so, shall take into account: whether the claimant wishes to be reinstated; whether it is practicable for the employer to comply with such an order; and, where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order their reinstatement. There are similar provisions relating to re-engagement in subsection 3.

6. The tribunal, therefore, has a discretion whether to make an order for reinstatement or re-engagement, and factors to consider include, but are not limited to, whether it is practicable for the employer to comply with such an order.

7. An employment relationship is not sustainable unless there is sufficient trust and confidence between the parties to that relationship. Indeed, a fundamental breakdown in trust and confidence due to the acts of an employer entitle an employee to resign and claim to have been constructively dismissed. That is exactly what happened in this case. We concluded, in our judgment on liability, that there was a fundamental breach of trust and confidence between the parties for the reasons we gave in that judgment. Based on both the findings of fact in the liability judgment and the further evidence of Lynn Collins at this remedy hearing, we conclude that the respondent also lacked confidence in the claimant, whether or not the respondent's loss of trust in the claimant was well-founded. Given the size of the employer and all the circumstances, we conclude that reinstatement or re-engagement would not be practicable. We, therefore, make no order for reinstatement or re-engagement.

8. If reinstatement or re-engagement is not ordered, the tribunal will make an award of compensation for unfair dismissal. We therefore turned to matters relevant to compensation and the issue of mitigation.

Compensation for unfair dismissal and mitigation of loss

9. Compensation for unfair dismissal is in two parts. The first is a basic award, calculated according to a statutory formula based on age at the effective date of termination, length of service and weekly pay (subject to a statutory cap). The second is a compensatory award. In accordance with section 123(1) Employment

Rights Act 1996, this is “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.” A person claiming compensation for loss of earnings is under an obligation to take reasonable steps to mitigate their loss.

10. Both the basic award and compensatory award may be reduced because of conduct by the claimant.

11. The compensatory award may be increased by up to 25% if the employer failed to comply with the ACAS Code of Practice on Discipline and Grievance.

12. On the claimant's evidence, in late May or early June 2017, she was offered a position in a new business on at least the same pay as the respondent. The prospective employer wanted references but the claimant took no action to get references so she did not take up employment. We accept the evidence of Lynn Collins that, had a reference been sought, she would have given a factual reference with dates of employment and the position held.

13. We conclude that, to reasonably mitigate her loss, the claimant should have sought references and addressed any issues which may have arisen. We cannot be certain what would have happened had she done so. However, we assess that there was an 80% chance that, with a factual reference supplied by the respondent, the prospective employer would have maintained the offer of employment and the claimant would have taken the job and, therefore, fully mitigated her loss at that stage. Given the date at which the claimant was offered employment, taking account of the time required to take references, we consider that, by mid June 2017, she would have started work.

14. We consider that, with reasonable efforts, the claimant could have obtained comparable work as a support worker within three months from mid June 2017. The reasonable steps to mitigate her loss would include obtaining references when required. There was work available as a support worker in the local area as evidenced by adverts shown to us. We are not referring to care work, which we accept is different in nature. We accept that, with the lack of recent experience in education, the claimant would have been less able to obtain work in the educational field than work as a support worker.

15. These conclusions lead us to calculate the compensatory award on the basis of awarding full loss for the period 14 March to 14 June 2017 and then 20% of loss for the period 15 June to 15 August 2017. I will come back to the calculation after dealing with the remaining matters of principle.

16. We assess an appropriate award for loss of statutory rights taking account of the claimant's rate of pay as being £350.

17. We do not consider that there was any conduct on the part of the claimant which should result in a reduction in either the basic or the compensatory award.

18. In relation to compliance with the ACAS Code of Practice on Discipline and Grievance, we consider that the respondent fell short of their obligations under the Code in relation to their failure to set out the allegations properly on occasions in

letters inviting the claimant to the disciplinary hearings. We consider that a 10% uplift in the compensatory award would be appropriate considering the level of seriousness of this failing. It was an important failing, but not the most serious failing. The respondent was attempting to follow appropriate procedures but was not greatly assisted by its HR advisers.

19. In making our calculations, we have decided not to take any account of income the claimant obtained from lodgers or the expenses of preparing the room to take lodgers. It is not clear from the evidence of the claimant whether, during the period for which we are awarding loss, there was any income from lodgers so we consider it fairest just to leave both the income and the expenses out of the calculation. We also make no award for expenses incurred for training courses. Given our conclusions on mitigation of loss and the period in respect of which loss should be compensated, we do not consider these relevant. They may have been relevant had we awarded loss over a longer period and considered that loss could not be mitigated satisfactorily by taking other employment but only by the claimant setting up in business on her own account.

Breach of contract

20. We make no separate award of damages for breach of contract since the claimant has been compensated for loss in the notice period as part of the compensatory award for unfair dismissal.

The calculation of compensation for unfair dismissal

21. We agree with the claimant's calculation of the basic award based on three years' completed service, a factor of 1.5 taking account of the claimant's age and the gross weekly pay of £326.80 which gives a basic award of £1,470.60.

22. The calculation of the compensation award is as follows. The annual gross pay was agreed to be £16,994.04. The gross monthly figure is £1,416.17. We convert this to a net monthly figure –. 20% comes off the gross figure because the claimant has informed us that all her income is taxed at 20% due to her pension income. 20% of the gross pay is £283.23. This gives a net monthly income with the respondent of £1,132.94.

Three months' full loss: 3 x £1,132.94 =	£3,398.82
Three months at 20% of that loss – 20% of 3 x £1,132.94 =	<u>£679.76</u>
Total loss of earnings =	£4,078.58.
Loss of statutory rights	<u>£350.00</u>
Compensatory award before ACAS uplift =	£4,428.58.
10% ACAS uplift	<u>£442.86</u>
Total compensatory award	£4,871.44

23. The grand total for unfair dismissal comprising the basic award and compensatory award after uplift is £6,342.04.

24. The recoupment regulations do not apply since the claimant did not make any application for benefits.

Employment Judge Slater

Date: 20 August 2019

REASONS SENT TO THE PARTIES ON

22 August 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.



NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2404021/2017**

Name of case(s): **Ms SM Brennan** v **Newbarn Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **16 July 2019**

"the calculation day" is: **17 July 2019**

"the stipulated rate of interest" is: **8%**

MISS H KRUSZYNA
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.