EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122822/2018

Hearing at Edinburgh on 3 and 4 June 2019

Employment Judge: M A Macleod

Catherine Cameron	**Claimant Represented by Mr J Hamlett & Ms A Turnbull - Strathclyde Law Clinic**
C M Optical Ltd	**Respondent Represented by Mr D Maguire - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. The claimant's claims of unfair dismissal and unlawful deductions of wages in respect of holiday pay succeed, and the respondent is ordered to pay to the claimant the sum of **Six Thousand Nine Hundred and Sixty Two Pounds and Eighty Six Pence (£6,962.86)**.

2. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply to this award. The monetary award in this case is £2,705.25. The prescribed element is £2,705.25, and the dates to which that prescribed element applies are 11 July 2018 to 2 December 2018 (25 weeks). The monetary award does not exceed the prescribed element.

REASONS

3. The claimant presented a claim to the Employment Tribunal on 16 November 2018 in which she complained that she had been unfairly dismissed by the respondent, and unlawfully deprived of notice and holiday pay. Although the claim form signalled that a claim for discrimination on the grounds of disability was being made, Mr Hamlett confirmed that this had been withdrawn in January 2019 by the claimant on the basis that it was noted in error on the form.

4. The respondent presented an ET3 in which they denied all claims.

5. A Hearing on the merits was fixed to take place for four days commencing on 3 June 2019.

6. The claimant attended and was represented by Mr Hamlett and Ms Turnbull, of the Strathclyde Law Clinic. Mr Hamlett spoke on behalf of the claimant throughout the hearing. The respondent was represented by Mr Maguire, solicitor.

7. A joint bundle of productions was presented at the outset of the hearing, and relied upon by the parties in the course thereof.

8. At the start of the hearing, Mr Maguire intimated that the respondent was willing to concede that the claimant had in fact been unfairly dismissed. The hearing was therefore only required to deal with the question of remedy, and the evidence led and presented focused on that issue rather than the merits of the claim.

9. The respondent called Christopher McGregor, Director, as a witness, and the claimant gave evidence on her own account.

10. Based on the evidence led and the information received, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

11. The claimant, whose date of birth is 11 April 1954, commenced employment with the respondent on 7 January 2008. She worked as a driver for 4 days a

week, working 7.30am until 2.30pm on Mondays, Tuesdays, Thursdays and Fridays.

12. The respondent is a business which manufactures spectacles. The two directors of the company are Christopher McGregor, and his wife Elizabeth (Liz). Liz McGregor is the claimant's sister. The company had three employees while the claimant was employed by them, namely the claimant, Margaret the bookkeeper and Brian Hutton, the technician.

13. Mr McGregor and Mr Hutton were responsible for the manufacturing process.

14. The claimant maintained that she had never been offered or shown a contract of employment by the respondent. A copy of a contract of employment without any individual names appended to it was produced (32). A peculiar feature of the contract, which the respondent insisted it shared with other contracts they issued, was that the name of the employer on the contract was Jones & Hoyland Ltd, of 4 Anderson Street, Airdrie, Lanarkshire ML6 0AA. Jones & Hoyland Ltd operated next door to the respondent's business, and was owned and run by the same directors as the respondent.

15. The notice provisions are set out in that contract (35). If an employee were to have more than five years' continuous service, they would be entitled to one week for each complete year of service up to a maximum of 12 weeks after 12 years' service.

16. On 27 June 2018, the respondent wrote to the claimant to invite her to a disciplinary hearing (43). The letter stated:

"Dear Catherine,

I am writing to tell you that CM Optical Ltd is considering dismissing you. this action is being considered with regard to the following circumstances:

You are sending in sick lines from your GP for Essential Hypertension and stress but the Company is aware that you are making frequent trips on a

daily basis to Glasgow to look after your Grandchildren while your daughter and her partner go to work.

You are invited to attend a disciplinary meeting on Wednesday 4th July at 11.30am which will be held in the office at CM Optical Ltd. At this meeting we may require you to give written authorisation for the company to write to your GP for a medical report to allow us to assess your fitness to carry out the duties which you are employed to do.

You are entitled, if you wish, to be accompanied by another work colleague or a trade union representative.

Yours sincerely,

C McGregor

Director."

17. The claimant texted Mr McGregor on 3 July to advise him that she would be unable to attend the meeting of 4 July as her trade union representative would be unavailable (64). She also asked for a copy of her contract of employment at that stage.

18. On 4 July 2018, Mr McGregor wrote to the claimant again (44) saying that she had failed to attend the meeting with no reasonable excuse. He went on:

"We have rearranged this meeting for Thursday 5th July at 10.00am which we would be grateful if you could attend to discuss your capability for work. We have attached a letter which you should sign in order that we can contact your GP to obtain a medical report regarding your hypertension and the details of your forthcoming operations which will allow us to determine your ability to carry on with your duties in the future.

Failure to attend the meeting or hand in the letter to allow us to contact the GP may result in dismissal from GM Optical Ltd."

19. The claimant wrote a letter in response to the respondent, on 5 July 2018 (46). She pointed out that she remained on sick leave, covered by GP sick

notes, and that she had already told the respondent that that date was not suitable as she was unable to arrange representation for the meeting at such short notice. She said that the second letter allowed her no further time within which to seek representation and that the date was unsuitable again.

20. On 11 July 2018, Mr McGregor wrote to the claimant (47) to inform her that the respondent had, "with much regret", dismissed her from her employment with effect from that date. He set out the history of the claimant's sick lines, and of the disciplinary hearings being arranged. He referred to the claimant's condition of hypertension, with poor control, pointed out that the claimant had not mentioned ankle surgery despite saying that she had been for a pre-operative meeting with the doctor and then said that as she was employed as a driver they needed to know that she would be fit to continue her duties after the operation and also required an indication of how long her recovery period would be.

21. He went on to suggest that the DVLA required to be informed if her high blood pressure rose above a certain level, and that if it did, the respondent's insurers would not be in a position to insure her to drive the vehicle.

22. He concluded:

"Based on the above and your reluctance to provide the required information we have requested we have taken the decision on your capability that you are deemed unfit to carry out the duties you are employed to do."

23. No right of appeal was mentioned in the letter of dismissal.

24. However, on 17 July 2018, (49) Mr McGregor wrote again to the claimant to advise that due to her lack of communication they were taking "this last opportunity" to remind her that if she were considering appealing he should receive this within 7 days from the date of her dismissal letter. He said that if she wished to appeal against the decision to dismiss, the respondent had to have her appeal in writing by close of business on 18 July 2019.

25. The claimant wrote to Mr McGregor on 18 July 2018, (50) confirming that she wished to appeal against the decision to dismiss her, and that she would confirm the reasons for her appeal "in due course".

26. Mr McGregor replied on 19 July 2018 (51), saying that because she had not provided any reasons or evidence they could not review the decision or consider her appeal.

27. The claimant was paid in full to the date of termination of her employment, but received no notice pay from the respondent.

28. The claimant has been unable to secure alternative employment since her employment was terminated by the respondent. She receives Universal Credit, and has also been in receipt of Employment Support Allowance. She also receives Personal Independence Payments due to the loss of function in her hand, following an incident in which she broke her arm some two years ago, amounting to £400 per month. She receives financial help from her daughter. She did receive, approximately one year ago, a bequest of approximately £9,000.

29. Following the termination of her employment, the claimant underwent ankle surgery which she said she had postponed on a number of occasions while in employment due to fear that her employment would be terminated if she took a substantial period of time off work. The operation took place in January 2019, and she had her ankle in a plaster cast for some 6 weeks, until approximately the middle of March 2019.

30. Medical records were produced on behalf of the claimant (75-80). From these notes the following entries are of relevance:

- 15 August 2018 – *"Not fit for work (Diagnosis Hypertension and Stress…Ongoing stress with sister and brother-in-law."*
- 18 September 2018 – *"still no word ankle surgery – ongoing legal case against employer – has caused family rift so stressed…"*

31. The claimant continues to be signed off sick from work up to the date of this hearing.

Submissions

32. For the claimant, Mr Hamlett made a short oral submission, which is summarised here. At the outset, he confirmed that the claimant now accepted that the holiday pay due related to 1.2 days as proposed by the respondent; and that the basic award is agreed between the parties to amount to £3,217.95.

33. He confirmed that the issue is now one only of quantum. With regard to wage loss, the claimant relied upon the calculation set out in the schedule of loss. The reason why the claimant has been unable to secure alternative employment has been because of her ill health, and the cause of her continuing ill health was her dismissal. She has not, he said, suffered stress prior to identifying the need to have ankle surgery. Had she not been dismissed, she would not have suffered stress and hypertension, and would have been fit to work.

34. He made reference to a number of cases, and then submitted that the claimant suffered from stress and hypertension exacerbated by her dismissal. She would have returned to work had she not been dismissed, and had attempted to mitigate her losses by seeking advice, and jobs, at the Job Centre. However, she has not been put forward for any position due to her continuing ill health.

35. The respondent failed to follow the ACAS Code of Practice. The respondent failed to carry out any necessary investigation, and before the Tribunal was unaware of the meaning of hypertension. They failed to investigate the extent of the claimant's conditions and the potential impact on her return to work. They also failed to investigate the reasons for her dismissal.

36. The arrangements for the disciplinary hearing were such that the claimant did not have a fair opportunity to respond to the allegations being made against her. She was unable to secure representation in time for the hearing, and therefore could not attend. She was not allowed the opportunity to advance her appeal, when the respondent declined her the chance to have a hearing on that.

37. Mr Hamlett argued that the award should be subject to a 25% uplift due to the unreasonable conduct of the proceedings (understood to mean the internal proceedings) by the respondent.

38. Mr Maguire, for the respondent, submitted that the Tribunal should prefer the evidence of the respondent's witness in this case. Mr McGregor was nervous and sometimes went off at a tangent but his evidence was truthful. However, he suggested that the Tribunal should treat the claimant's evidence with a degree of caution. For example, when asked about others in the company having contracts of employment, she said that Brian had refused to sign his contract, before retracting that. Mr McGregor's position is that the claimant was offered a contract but declined it on the basis that it was unnecessary.

39. In addition, he said, the claimant exaggerated her financial difficulties, and did not disclose that she had received an inheritance. Where there was a conflict between the parties, Mr Maguire invited the Tribunal to prefer the evidence of the respondent.

40. He noted that it was unfortunate that no medical evidence has been produced on the claimant's behalf.

41. With regard to the wage loss claim, the claimant was signed off four weeks prior to her dismissal due to hypertension, poor control and stress. The claimant confirmed that she had had a turn at work a year previously, and therefore he submitted that the claimant had ongoing and pre-existing issues with regard to blood pressure.

42. It cannot be said that she has only been unfit for work due to her dismissal.

43. Section 123 of the Employment Rights Act 1996 provides that the Tribunal should award such sums as are just and equitable, having regard to the losses sustained in consequence of the dismissal. Had she not been dismissed, the claimant would still be signed off work due to illness. Her sickness absences cannot be said to be attributable to her dismissal.

44. She also had an operation on her ankle which would have rendered her unfit for work for a period of time.

45. Mr Maguire submitted that the claimant's stress comes from a number of sources – high blood pressure, the need to undergo surgery, the prospect of undergoing surgery, a family feud.

46. He argued that the claimant has failed to take reasonable steps to mitigate her losses. She said she has been attending the Job Centre but provided no evidence of having attempted to mitigate her losses. She did say remained signed off unfit for work as she required in order to receive benefits. There is therefore no evidence before the Tribunal that she had made any efforts to mitigate her losses.

47. With regard to the uplift, Mr Maguire submitted that the respondent is a very small employer, with 3 employees, which had never previously gone through a disciplinary process. There are flaws, he admitted, but allowance has to be made for the size and resources of the employer. They did seek advice from ACAS and did give the claimant 7 days of the first hearing. It was a reasonable attempt to follow the procedure. He accepted that they should have allowed the appeal to proceed. Ideally someone independent should hear the appeal but this is a small company and it is therefore difficult to achieve that. This is not a case which would merit the maximum uplift, he argued. This would justify an uplift, if any, at the lower end.

48. Mr Hamlett responded briefly by arguing that Mr McGregor contradicted himself in many ways during his evidence. He pointed out the medical information which is available to the Tribunal in the form of sick notes and medical notes (72-78).

The Relevant Law

49. Section 123(1) of the Employment Rights Act 1996 (ERA) provides:

"Subject to the provisions of this section and sections 124, 124A and 126, 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."

50. Section 123(2) adds that that loss shall be taken to include the loss of any benefit which the claimant might reasonably be expected to have had but for the dismissal. Section 123(4) also provides that in ascertaining the loss, the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the law of Scotland.

51. Both parties referred to **Dignity Funerals Limited v William Douglas Bruce [2004] ScotCS 230**, a decision of the Court of Session Inner House. In that decision it was made clear that a Tribunal must consider whether or not the reason, or part of the reason, for a claimant's ongoing unfitness for work, could be attributed to the dismissal. The Court stated, at paragraph 15, that in that case the Tribunal's decision not to make a compensatory award for the period to the date of the hearing was not well founded, because the decision was made "without a proper basis of findings of fact and without proper and adequate reasons. The Tribunal made no finding as to whether the dismissal was a cause of the respondent's unfitness at all."

Discussion and Decision

52. The respondent has admitted that the claimant's dismissal in this case was unfair.

53. The Tribunal must therefore consider what award, if any, is to be made to the claimant in respect of that unfair dismissal.

54. Firstly, the Tribunal must decide whether or not a basic award should be paid. In this case, in my judgment, there is no dispute that the basic award is payable to the claimant. Even if there were a dispute, I would find that a basic award is payable. The decision of the respondent to dismiss the claimant, at the point when they did, is quite incomprehensible. It remains unclear whether the reason was one of capability or conduct, and if so, on what basis either decision was or could be made on the facts.

55. The respondent must therefore pay to the claimant the basic award of **£3,217.95**. There is no suggestion by the respondent that the claimant, by her own actions, should have that award reduced, and accordingly that is the full amount which the respondent must pay to the claimant.

56. Secondly, the Tribunal must decide whether, and if so in what amount, the claimant is due a payment by way of a compensatory award.

57. The evidence demonstrates that the claimant has not worked since her dismissal, and that she has not applied for any position since that dismissal. She remains unfit for work, and has regularly attended her doctor in order to confirm that.

58. The precise reason why the claimant has remained unfit for work since her dismissal is slightly unclear. It appears to be based on two issues, namely hypertension caused by stress, and the time spent in a plaster cast following her ankle surgery, a period of some six weeks. These two issues may be concurrent.

59. What the Tribunal must consider is whether or not the dismissal has been the cause, or the principal cause of her continuing unfitness for work. The claimant gave evidence to the effect that had she not been dismissed, she would have, and would have been able to, return to work. The dismissal, however, caused her a great deal of stress and as a result she has been limited in her ability to make attempts to mitigate her losses since her dismissal.

60. There is little medical evidence available to the Tribunal other than the medical notes to which the claimant made reference in her evidence, found at 77 and 78.

61. The conclusion which I have drawn from this evidence is that the medical records confirm that she told her doctor that she was suffering from stress following her dismissal, and arising from the legal proceedings which followed from that dismissal. The stress arose, in those records, from the "rift" with her family which this case had caused. During the evidence, there was reference, slightly opaquely, to a "family feud" though the cause was

not explored or explained. It is my judgment that the claimant has been inhibited in her ability to seek alternative employment, and has continued to be unwell since her dismissal, at least in part because of her dismissal, which had led to the proceedings which caused the family rift.

62. However, it is also clear that the claimant has suffered from high blood pressure, or hypertension, for some 20 years, and therefore that the dismissal did not operate as the primary cause of stress or high blood pressure, but served to exacerbate an existing condition. Further, the claimant required to take time off from what would have been working time in order to undergo long-awaited ankle surgery. That removed 6 weeks from the time under consideration, for a reason unrelated to the claimant's dismissal.

63. The claimant has not applied for any positions at all, and has received payments in respect of Employment Support Allowance due to her ongoing unfitness for work.

64. In my judgment, it is just and equitable to make an award to the claimant of 25 weeks' pay from the date of dismissal by way of a compensatory award in this case. It is not just to award the claimant the full amount of her wage loss to the date of the Tribunal, because it is not possible to make a definitive finding that the stress caused to her was entirely caused by her dismissal, and that the hypertension would not otherwise have arisen owing to "poor control" of her medication.

65. As far as future loss is concerned, the claimant accepts that the litigation itself is partly responsible for her unfitness for work, and that, combined with the recovery she has now made from her ankle surgery, suggests that the constraints which have prevented her from making efforts to find alternative employment will now be lifted, and she can move on to find new paid employment.

66. On this basis, the compensatory award to the claimant is 25 weeks, at £207.81 per week, bringing out a figure of £5,195.25; to be reduced by the earnings/benefits received by the claimant, which is understood to represent

the sum she received in Employment Support Allowance, of £89.60 per week, amounting to £2,490. Accordingly, the compensatory award to be paid to the claimant in respect of loss of earning is £5,195.25 - £2,490, which comes to **£2,705.25**.

67. An award of **£350** in respect of the claimant's loss of statutory rights is also just and equitable in this case.

68. The total award to the claimant therefore comes to **£6,273.20**.

69. The final question, then, is whether any uplift should be made to the claimant's award by reason of the respondent's failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015).

70. It is important to recognise that this is not an automatic uplift which follows an unfair dismissal. The unfairness towards the claimant is reflected in the basic and compensatory awards already addressed. The question is whether the respondent unreasonably failed to comply with the Code of Practice.

71. In my judgment, it is relevant to consider the requirement to carry out necessary investigations in potential disciplinary matters (paragraph 5); to notify the employee of the problem (paragraph 9); to allow the employee reasonable time to prepare their case (paragraph 11); to allow the employee to be accompanied (paragraph 13) and to provide the employee with an opportunity to appeal.

72. In this case, the respondent appears to have carried out no investigations into this matter. On the evidence available to me, it appears that some information was gleaned "on the grapevine" that the claimant had been using her time off for child care purposes, though that was never established as a fact because it was not investigated. No account appears to have been taken of any medical information supplied by the claimant.

73. The notification of the meeting lacks any clear specification as to the issue to be addressed at the meeting.

74. The claimant confirmed that she was unable to meet on 4 July so the respondent simply rearranged for the following day, and then appears to have met on 11 July without notifying the claimant at all that there would be a third occasion to meet. The situation was very confused, and confusing, but it is clear that the claimant had insufficient time to prepare for a meeting which, lest it be forgotten, led to the end of her employment after many years of service without apparent blemish.

75. The claimant was simply not given the opportunity to be accompanied, despite raising this with the respondent.

76. The claimant was offered the opportunity to put in an appeal, but when that was received, the respondent took the decision not to proceed with it, apparently because no detailed reasons were given for the appeal. In my judgment, this was merely an excuse not to take the matter forward and Mr Maguire, very fairly, conceded that the appeal should have gone to a hearing.

77. As a result, I am persuaded that there have been a number of departures from the ACAS Code in this case, and that an uplift is appropriate.

78. However, I do not consider the departures to have been so egregious or malicious as to justify the uplift sought by the claimant of 25%, the maximum available.

79. This is a small, family-run firm. They took advice from ACAS as to how to proceed. The precise terms of that advice are not known to the Tribunal, but while it is unlikely that the process which was followed was in any way endorsed by ACAS, it may have been that the respondent misunderstood the advice, or applied it without fully understanding the consequences. It appears to me that Mr McGregor was perhaps guilty of inexperience, and even naivete, in dealing with this matter, but given the lack of resources available to him in his company, this is understandable to a degree. He has no human resources adviser on hand to help him in this kind of situation, which was unique in his experience of running a small business.

80. Accordingly, it is my judgment that the uplift should be fixed at 10%. I consider this to be a just and equitable proportion by which to increase the awards made to the claimant in all the circumstances of this case, and that this provides the claimant with adequate compensation for the unfair dismissal visited upon her.

81. An uplift of 10% leads to an award of **£6,900.52**.

82. The claimant also seeks an award in relation to the respondent's failure to provide her with a written statement of terms and conditions of employment. In my judgment, the evidence on this point is simply impossible to disentangle. The claimant alleges that she never saw her contract until these proceedings. The respondent says that she was offered a contract at the outset of her employment, but said that it was unnecessary owing to the relationships involved. The claimant described this as "false".

83. Section 1 of ERA provides that when an employee begins employment with an employer, "the employer shall give to the employee a written statement of particulars of employment". It matters not whether the claimant has asked for that written statement: the obligation is upon the respondent to provide it.

84. In this case, the respondent insists they did provide one, but that the claimant decided it was unnecessary. The respondent gave evidence, not contradicted by the claimant, that other staff did have contracts of employment given to them.

85. On this point, I am not prepared to find that either the claimant or Mr McGregor are lying about this, but I do find that it is not possible for them both to be right about whether the claimant was offered a written statement of terms and conditions of employment.

86. I have come to the conclusion that the claimant has not proved that there was a failure on the part of the respondent to provide her with a written statement of terms and condition of employment when she started. On the balance of probabilities I am prepared to accept that the respondent did offer her a written statement but that for whatever reason the claimant decided not to accept or sign it. As a result, this claim fails.

87. The only outstanding claim remaining was the claim that the respondent had failed to pay the claimant the correct sum in respect of holiday pay, but my understanding is that the parties reached an agreement to the effect that the claimant accepted that the respondent's figures were correct, and therefore no further payment is sought beyond the 1.2 days agreed by the respondent.

88. Accordingly, the respondent is ordered to pay to the claimant the sum of **£62.34** in respect of payment for annual leave accrued but untaken as at the date of termination of her employment.

89. The claimant's claims of unfair dismissal and unlawful deductions of wages in respect of holiday pay therefore succeed, and the respondent is ordered to pay to the claimant the sum of **£6,962.86**.

90. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply to this award. The monetary award in this case is £2,705.25. The prescribed element is £2,705.25, and the dates to which that prescribed element applies are 11 July 2018 to 2 December 2018 (25 weeks). The monetary award does not exceed the prescribed element.

Date of Judgement: 8th July 2019

Employment Judge: Murdo MacLeod

Entered in Register: 11th July 2019

And Copied to Parties