Case Numbers: 2204779/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms M Leite		**LondonHelp4U Consultancy Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 15 JULY 2019

Introduction

1. The Respondents are the corporate vehicle for a small legal advice service established by its sole director, Ms Francine da Silva. They had some 14 employees in 2017 but the headcount dwindled to 12 by January 2018 and six by the end of August the same year. They offer low-cost advice in areas such as student exchange, citizenship, immigration and foreign family law, principally to members of the Spanish- and Portuguese-speaking communities in and around London.

2. The Claimant was continuously employed by the Respondents and their predecessors (it seems that there may have been a TUPE transfer) from 23 March 2015 until 15 April 2018, when she was dismissed with pay in lieu of notice on the stated ground of redundancy. A statutory redundancy payment was also paid to her.

3. By her claim form presented on 27 May 2018 the Claimant complained of unfair dismissal. The Respondents resisted the claim as maintained in any event that, given what had been paid to her, she should receive no compensation in any event. By para 14 of the grounds of resistance they further pleaded that her claim was "negated" by the alleged fact that she had committed an act of gross misconduct, of which they have not been aware of the time of the dismissal.

4. It is a matter for regret that this straightforward dispute has been over-litigated, necessitating two case management hearings (ordinarily, unfair dismissal claim would warrant none). The energies of the parties has been needlessly expended on a host of irrelevant matters which have no bearing upon the narrow issues for decision by the Tribunal.

5. The final hearing was listed before me for three days commencing on 9 July this year, a prior fixture having been vacated. The Claimant attended,

represented by her husband, Mr M Selfe; the Respondents appeared by Mr K Clair, a solicitor.

6. I heard evidence on behalf of the Respondents from Ms Da Silva, Mr Leonard Taylor, Office Manager, and Mr Humberto Ferrarini, Immigration Department Manager. The Claimant also gave evidence, but called no supporting witness. In addition to hearing evidence I read the documents to which I was referred in the over-large bundle of almost 300 pages. On the afternoon of day one, having heard closing submissions on liability, in which Mr Clair did not press the defence pleaded in the grounds of resistance, para 14, I gave an oral judgment in the Claimant's favour and encouraged the parties to resolve the remedy claims by consent and thereby save themselves the cost and trouble of attending on the following day. Unfortunately, they were unable to reach agreement and we resumed on the morning of day two to consider remedies. After some debate, further evidence from the Claimant and Ms Da Silva and further submissions on both sides, I gave an oral decision on points of principle relevant to the claim for compensation. On the basis of that adjudication we then arrived together at a total award, agreed as a figure, of £5418.09.

7. These reasons are supplied in writing pursuant to a written request on behalf of the Respondents.

The Law

8. Compensation for unfair dismissal divides into the basic and compensatory awards. There was no question here of the former, because the Claimant received an equivalent sum in the form of a statutory redundancy payment.

9. As to the latter, the Tribunal is invested with a wide, discretionary power. By the Employment Rights Act 1996, s123(1), "… 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."

The Facts

10. The Respondents are regulated by the Office of the Immigration Services Commissioner ('OISC').

11. When the Claimant's employment began she was already an OISC Level 1 adviser. That is the lowest level of adviser.

12. In early 2018 the Claimant was registered to sit the OISC Level 2 exam, which was due to be held on 25 May of that year.

13. In early April 2018 Ms Da Silva told the Claimant that success in the exam would attract an increase in her basic annual salary of about £4000, to about £24,000. The figure appears to be representative of rewards enjoyed

by Level 2 advisers in the market generally.

14. Within a few days, however, Ms Da Silva called the Claimant into a meeting and dismissed on redundancy grounds. She explained that the company was in difficulty and that immediate steps were necessary. There was no discussion about alternative employment.

15. I am satisfied that this surprising and, from the Claimant's point of view, distressing turn of events did result from advice given by the company's accountant on 10 April 2018 that the Respondents' finances were in a serious condition and immediate cost-cutting was necessary. I further accept Ms Da Silva's evidence that the advice did not come out of nowhere: the organisation's economic results and outlook had been deteriorating for over a year.

16. There was a lesser role which the Claimant could have been offered, as an Immigration Assistant. The Respondents were planning to recruit someone to that position at the very time when they dismissed the Claimant. Ms Da Silva did not think to offer her that possibility or even raise it for discussion. If she thought about it at all, she made the assumption that a downward move would not be acceptable to her. What she did not reflect upon was the advantage which the Claimant would have gained in the short term from retaining a position with the Respondents, namely continued eligibility to sit the Level 2 exam. It was common ground before me that a serious side effect for her of losing her job on 10 April was that (unless she found herself incomparable employment elsewhere very quickly) the chance of sitting the exam was also lost. This seems to have been the effect of a rule or condition imposed by OISC.

17. Although on a personal level the Claimant got on well with Ms Da Silva and others in the company, she had, by April 2018, accumulated a sizeable list of grievances of one sort or another (to which copious references were made in her evidence) and she did not regard her future there as long-term.

18. The Claimant has a law degree from a university in her native Brazil. She passed the Level 1 test at the first attempt. She told me that she had acquired past papers for Level 2 and was working through them up to the date of her dismissal. I accept that she felt confident of passing on 25 may. On the other hand, I accept Ms Da Silva's evidence, not challenged by the Claimant, that the pass rate at Level 2 is much lower, namely around 30%. I note also that she accepted that many candidates at Level 2 have similar educational backgrounds to her. Nor did she dispute that a capable former colleague of hers failed the level 2 exam at the first attempt.

Secondary Findings and Conclusions

Liability

19. What was the true reason for dismissal? I accept Ms Da Silva's evidence that she dismissed the Claimant because she believed it was necessary to

do so in the interests of the company, given the advice she had received from the accountant. She believed that she could run the business with a reduced headcount and that the Claimant was the right candidate to be sacrificed to that end. Was the Claimant in fact or in law redundant? I find that she probably was but that, in the end, the point matters little. If not, the Respondents make out in the alternative a 'some other substantial reason' ground for dismissal. Either way, a potentially fair reason for dismissal is established.

20. Did the Respondents act reasonably in treating the reason as sufficient? Bearing in mind, as I do, that that question must be addressed by asking whether their actions fell within a range of reasonable (or permissible) options, I am quite satisfied that this dismissal was comfortably outside the generous ambit of reasonable decision-making. The Claimant was given no warning. There was no consultation. There was no effort to explore the possibility of finding an alternative to dismissal. The case is very plain indeed: this was a conspicuously unfair dismissal.

Remedy

21. The only remedy sought was compensation. No basic award is recoverable because a redundancy payment has been made.

22. Turning to the compensatory award, my adjudication on the points of principle was to this effect.

    1) Had Ms Da Silva given the case the time, care and thought which it merited, and engaged in an appropriate dialogue with the Claimant, the possible solution of offering her the planned vacancy of Immigration Assistant would have emerged.
    2) The Claimant would have accepted that offer because it would have enabled her to remain a candidate for the Level 2 exam on 25 May. That was very important to her because she saw it as a means of taking a significant stride forward in her career.
    3) Had she sat the exam, she would have had an evens chance of passing it.
    4) Successful or not, the Claimant would have left the Respondents' employment by the end of August at the latest. She thought that job prospects elsewhere were promising, particularly if she secured the Level 2 qualification. In any event, her dissatisfaction with the Respondents as employers was such that she was determined to leave and make a fresh start elsewhere.

23. Mr Clair submitted that the results of my analysis was that the Claimant was entitled to minimal compensation, limited to out-of-pocket losses between the expiry of the notice period (payment in lieu of which had been made) and 31 August 2018. I did not agree. It seemed to me that his argument ignored a loss which flowed directly from the unfair dismissal, namely the loss of the chance to acquire, before 31 August 2018, an enhanced earning capacity in the open job market and, after that date, the benefit from it. Having regard to the wide language of the 1996 Act, s123(1), I considered

that this loss was comfortably within my power to compensate. I invited Mr Clair to put before me any authority to the contrary. He did not do so.

24. How should the Tribunal quantify the loss to which I have referred? In the absence of any assistance from Mr Clair, and the Claimant and Mr Selfe being without any relevant legal training, I had to do the best I could alone. I took as a starting point the proposition that there was a gap of about £5000 between the Claimant's notional annual earning capacities at Level 1 and Level 2. Regarding her as an intelligent, determined and resourceful individual, I considered that she would, by one means or another, recover from the disadvantage flowing from the lost opportunity to sit the exam within 18 months. That gave a starting-point figure of £7,500. Then it was necessary to apply a substantial discount: 50% for the evens chance that she would have failed the exam and a further substantial proportion on account of other risks and imponderables, including possible delay in securing alternative employment and the vicissitudes of fate generally. All in all, I settled on a discount of 75% producing a sum of £2812.50.

25. To their credit, the parties did at least agree the other element of the compensatory award, namely the monetary loss up to 31 August 2018, in the sum of £2605.59.

26. Accordingly, I awarded the sum shown in the judgment, noting that it was agreed as a figure although, of course, the reasoning on which the calculation was based was controversial.

EMPLOYMENT JUDGE - Snelson

Reasons Sent to the parties on: 17/09/2019

For Office of the Tribunals