



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102573/19

Held on 4 November 2019

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**Employment Judge J Hendry
Tribunal Member K Pirie
Tribunal Member D Massie**

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Mrs. S Putra

**Claimant
Represented by
Ms. V Mockus – Friend
Mrs. G King – Interpreter**

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De-Luxe Office Cleaners

**Respondent
Represented by
Ms. G Duffy – Consultant
Instructed by
Mr. G Stables – Partner**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that:

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1. The respondents shall pay to the claimant a monetary award amounting to One Thousand One Hundred and Fifty Six pounds and Ninety Eight pence (£1,156.90) consisting of a basic award of £391.50 and a compensatory award of (£400) and (£365.40).

2. The respondents shall pay the claimant the sum of Three Hundred and Thirteen pounds and Twenty pence (£313.20) as payment in lieu of notice.

E.T. Z4 (WR)

3.The respondents shall pay the claimant the sum of Sixteen Pounds and Eighty-Six Pence (£16.86) as accrued but untaken holiday leave.

REASONS

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1. The Employment Tribunal issued a Judgment dated 10 September 2019 issued to parties on 11 September upholding the claimant's application for a finding that she had been unfairly dismissed, was entitled to pay in lieu of notice and entitled to holiday pay that had accrued from 20 September 2018 until 9 October 2018.

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2. The case proceeded to a hearing on remedy which took place on 4 November.

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Preliminary Matters

3. On the morning of the hearing the respondent's represented lodged a supplementary bundle for use in the remedy hearing (SB1-4) and also written submissions. The claimant did not lodge any documentation in support of her claims and it became clear in the course of the morning that there had been an error in that the Tribunal had issued Orders for the claimant to prepare a Schedule of Loss and relevant documentation within a specified period and that this period ended after the date of the Tribunal hearing.

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4. The claimant's representative Ms Mockus explained that the claimant had been unaware of the requirement to lodge documents before the hearing having misunderstood the position and accordingly now that she understood what was required of her she wanted to lodge them this morning. It also became apparent that the claimant needed time with the interpreter to read over the respondent's supplementary bundle and accordingly the Tribunal granted an adjournment to allow both sides an opportunity to prepare further.

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5. The Tribunal understood, wrongly as it turned out, that the claimant had been passed a copy of the remedy hearing submissions and it duly transpired that the Tribunal only became aware of this mid-afternoon. This occasioned a further postponement to allow the submissions to be read and considered by the claimant.

6. The Tribunal accordingly apologises for the somewhat “stop start” nature of the hearing which unfortunately was caused by these events but the adjournments were required to allow the claimant to fully participate in the hearing through the use of the interpreter.

7. As part of the papers lodged by the claimant (CR1-29) Ms Mockus had taken a Schedule of Loss (prepared sometime earlier when the claimant was represented by solicitors) and amended it. She had added to the Schedule the cost of the claimant’s lawyer’s services. She was advised by the Tribunal that this was not a proper head of claim that could be included. As indicated both in the Judgment and the Schedule of Loss the claimant sought a basic award, Ms Mockus also made reference to her statutory rights, and financial loss including future financial loss. The claimant’s right to accrue holidays during her maternity period had been canvassed in the merits hearing.

8. The significance of the respondent’s remedy hearing submissions was not fully understood by the claimant until paragraphs 5 and 6 were read to the claimant by the interpreter mid-afternoon as part of cross-examination. In short, the respondents had offered re-engagement. That offer was declined. Accordingly, the remedy hearing concluded after hearing evidence from the claimant and also some additional evidence from Ms Grams, a Director of the Company.

30 **Facts**

9. The claimant is a Latvian National. She does not have a strong command of the English language.

5 10. The claimant had worked as a cleaner with the respondents before her employment terminated. Her gross annual basic pay was £4,632.13. her gross weekly basic pay was £78.30. In the four years of the claimant's employment on occasion she reached the relevant earnings threshold for pension contributions. In this whole period the employers paid £7 towards the claimant's pension.

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11. The claimant gave birth to twins on 12 November 2018. Her maternity leave would have ended in July and she intended to return to work at the end of July 2019.

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12. The claimant has two other children, one is 7 and one is 13.

13. The claimant receives child benefit weekly and also tax credit.

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14. After the claimant was dismissed she spoke to her sister who works as a cleaner in Aberdeen. Her sister has promised to advise her if and when a cleaning job becomes available with the company she works for. The claimant has to work flexibly around her children's needs. Since July the claimant has been waiting for a job there. The claimant has taken no other steps to obtain employment. She has not applied for Jobseekers' Allowance. She has not applied to Agencies or circulated her C.V. to prospective employers. The claimant does not feel confident to attend interviews because of her limited knowledge of English.

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Witnesses

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15. We found the claimant to be a credible and reliable witness. We also found Ms Grams credible and reliable. There was really no material dispute on the

facts. The only issue requiring clarification by Ms Grams' evidence being the sums paid by the employer towards the claimant's pension which the claimant had believed from a misunderstanding of the situation to a regular pension contribution.

5 **Submissions**

16. The respondents set out their submissions in their written document. Ms Duffy's position was that the claim should be struck out because of the failure to lodge documents for the hearing. In the alternative her position was straightforward namely, the claimant had failed to mitigate her loss. The Tribunal would, in her submission, have to take this into account when assessing what sums if any the claimant was due. As part of the failure to mitigate her losses the claimant refused to accept the offer made by the respondents for re-engagement. This is a significant factor the Tribunal should have reference to.

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Decision

17. The first issue we considered was the application to strike out. We were not minded to strike-out the claimant's application given the circumstances here and the fact that she has clear and apparent language difficulties. The confusion over the lodging of the documents is understandable given the error in the Order and the fact that the claimant is not familiar with Tribunal procedures.

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18. As the Tribunal indicated in its principal Judgment this is an unfortunate case that arose through confusion between the parties almost certainly arising from language difficulties. It was unfortunate that the offer to re-engage the claimant was not made until the day of the remedy hearing. The Tribunal had assumed that it would have been discussed between parties during the adjournments and the offer was referenced in general terms by the Tribunal prior to the first adjournment.

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19. The fact that the offer came so late in the day probably hardened the claimant's attitude towards accepting it. She was clear that the claimant's employers had a long time to accept that an initial mistake had been made by them but had refused to acknowledge that a mistake had been made. She explained that in these circumstances she was not prepared to return to the respondent's employment. The matter was not helped by the fact that the actual offer of re-engagement was not read to the claimant until the latter stages of the hearing due to the confusion that we have made reference to earlier. It is perhaps unfortunate the claimant decided to proceed to press her claim when the offer of employment and some payment was available to her but we can fully understand the reasons she has given for that position. In our view the offer does seem to come very late in the day and there is some force in the claimant's position that if the respondents had been less dogmatic initially that in recognising that an error had been made by characterising the claimant leaving on maternity leave as her leaving permanently then matters could have been resolved at an earlier stage.

20. Looking at the matter in the round it is apparent that there has been a breakdown in her trust of the respondent's and their motives. We do not accept the submission that the failure to accept re-engagement is a failure to mitigate her loss in these particular circumstances.

21. We then considered the claimant's actions in seeking other employment. The Tribunal has some considerable sympathy with the situation the claimant is in. She has very little English. We can understand her trepidation at undertaking interviews and the practical difficulties involved in actually arranging suitable employment. The claimant's position in evidence was that she was unable to attend interviews because of language difficulties, unable to prepare a C.V. for the same reason and so on. Nevertheless, we could not accept her position that she had taken steps to mitigate her loss in this regard. She clearly has not. It may be that her legal representative did not remind of her duty to mitigate, we cannot say, but for whatever reason she has taken insufficient steps to obtain employment.

22. The claimant is by no means an unresourceful person. She had sufficient acumen to instruct solicitors at one point, to contact the CAB and get advice from them both in respect of the original Tribunal claim and in relation to the remedy hearing thus begging the question why she had not sought advice regarding what facilities were available to her to look for work and apply for benefits etc. She has the assistance of her very capable friend Ms Mockus. We noted that she clearly has been able to apply for some benefits. It is surprising that she has not sought Jobseekers' Allowance which would provide her with some assistance and structure in finding work.

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23. As we noted earlier while we did not ultimately accept the respondent's position in relation to the offer of re-engagement as being a failure to mitigate there was in failing to seek other employment such a failure.

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24. The claimant is entitled to a basic award based on her age and service of £391.50 (1 x 5 x £78.30). We do not believe that it is just and equitable to award the claimant any future financial loss for the reasons given above. However, she would have accrued holiday rights during her period of maternity leave from October until July and this we calculate as 10 months entitlement £365.40 (10/12 x 5.6 weeks £78.30) We will award her £400 in relation to loss of statutory rights. This is an important right for someone like the claimant in low paid and part-time employment. The claimant is also entitled to notice amounting to four week's pay of £313.20. The notice period would have occurred during the maternity leave and no issue of mitigation arises in this regard.

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25. Neither party provided the Tribunal with any calculations for holiday pay. It is a small sum. It is whatever accrues in two weeks. We calculate it to be one days leave amounting to £16.86. (2/52 x 5.6 x £78.30)

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26. In passing we would congratulate Ms Mockus for supporting the claimant throughout the two hearings and for asking pertinent questions, although not

always at the right time, about the process as it developed and relaying this information to the claimant.

27. There is one other matter which we mention by way of conclusion and wish
5 to record. In the course of hearing evidence both at the first hearing and now
at the remedy hearing it was apparent that some of the correspondence that
had been sent on the claimant's behalf by her then solicitor undoubtedly
hardened her employer's attitude to resolving the case amicably. Some of
that correspondence was demonstrably inaccurate and not justified such as
10 the allegation that they were not paying the Minimum Wage. It was clear from
the respondent's witnesses that this allegation particularly inflamed the
situation and was unfounded. We were also disappointed to note that the
claimant, with all the difficulties that she had with language, was apparently
told the night before the first hearing that her solicitors could no longer
15 represent her. While it is not for us to comment further, and there may be
reasons why events occurred in the way they did, it may be that the claimant
will seek to raise these issues with her former solicitors or in the alternative
seek the assistance of the Scottish Legal Services Ombudsman.

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Employment Judge:	James Hendry
Date of Judgment:	20 November 2019
Date Sent to Parties:	21 November 2019

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