Case No: 2302595/2017

EMPLOYMENT TRIBUNALS

Claimant: Ms. P Bertram

Respondent: Bermondsey Community Nursery

Heard at: **London South, Croydon**
On: **22 November 2019**

Before: **Employment Judge Sage**
Members: **Ms. L Grayson**
Mr. N Shanks

Representation

Claimant: In person

Respondent: Ms. Hall of Peninsula

RECONSIDERATION JUDGMENT

The Claimant's application for a reconsideration under rule 71 is refused on the grounds that there is no reasonable prospect of the decision being varied.

REMEDY JUDGMENT

1. The Respondent is ordered to pay to the Claimant a basic award to **£11,736.**
2. The Respondent is ordered to pay to the Claimant a compensatory award of **£23802.36.**

For the avoidance of doubt the total sum awarded to the Claimant is **£35,538.36**

This sum is not subject to recoupment.

REASONS - RECONSIDERATION

1. At the end of the evidence in the remedy hearing the Claimant enquired when her reconsideration would be dealt with. Unfortunately, due to an administrative error, the reconsideration application had not reached the file. The Respondent accepted that they had received it and on enquiry the Claimant was able to provide a copy of the application to the Tribunal.

2. The Tribunal adjourned to consider the most appropriate manner of dealing with this application. The email was dated the 24 June 2019 and was presented in time under rule 71. The Tribunal considered the application and concluded that two of the matters which were applications to correct accidental slips, were capable of correction at any time and could be dealt with at the hearing. The Claimant's application for paragraphs 15 and 58 to be amended were allowed, in the absence of any objection by the Respondent. The correction in paragraph 15 was to delete the first sentence and in the third sentence to delete reference to Ms. Michaels and to replace it with the name of Ms. Kolenda. In paragraph 58 the name of Spencer is to be changed to Seymour.

3. The Tribunal then considered the application for reconsideration which was essentially that the Claimant wished the Tribunal to revisit our decision to reduce the compensatory award by 50% to reflect the contributary fault of the Claimant. In the application the Claimant referred to the evidence before the Tribunal and the conduct of the suspension meeting. The Claimant in the second bullet point of her request for reconsideration referred to the lack of documentation produced by the Respondent and that this disadvantaged her in defending herself. She also referred to the failure of management to keep adequate records and that she was managed by a number of people over the relevant period. In the last bullet point of the submissions the Claimant denied that she had self authorized a pay increase and referred the Tribunal to the evidence of Ms Letcher, who authorized the increase. The Claimant concluded by saying that she had worked over and above the additional 3.5 hours without pay for a number of years. She asked for the Tribunal to reconsider the decision on the issue of the 50% contribution.

The Law

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1

Rule 70 Principles

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

Rule 71 Application

Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Rule 72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full Tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full Tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full Tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Rule 73 Reconsideration by the Tribunal on its own initiative

Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

The unanimous decision of the Tribunal is as follows:

4. The Tribunal carefully considered the Claimant’s application but would firstly like to say that all of the facts referred to above in support of the application were considered in detail in our reserved decision. The Claimant referred in her application to the factual details of the case which we considered in detail together with the lack of documentation produced or retained by the Respondent. These were facts that were considered by the Tribunal. We also considered the change in line management and the different approaches followed by Ms Letcher, Ms Kolenda and Ms Seymour.

5. Although the Claimant says in her application that she did not self-authorize a pay increase and she referred to the evidence of Ms Letcher alone, however when reaching the decision on the issue of contribution, the Tribunal took into account a wider view of the evidence over a longer period of time. The Tribunal noted that there was a distinct difference in the evidence between that of Ms. Letcher who in her statement to the

investigation stated that the pay and hours increase was on an ‘as and when required’ basis and we refer to our paragraph 34 of our findings of fact.

6. The Tribunal then saw emails sent by the Claimant to Ms. Seymour where she made no mention of working the flexible half day on Friday. It was this evidence that led to Ms. Seymour becoming suspicious of the working arrangement and led to the decision to investigate further. When the Tribunal considered the evidence given about the half day working, we took into account all the evidence from all witnesses, that included in oral evidence, statements and in documents. The Tribunal took into account the poor record keeping and the fact that the Claimant was the most senior employed person in the Respondent organization who bore some responsibility to keep records of the work she carried out. We also considered the Claimant’s vague evidence of when the additional hours were worked and what work was carried out.

7. The Tribunal noted that the figures were provided to the accountant, Treasurer and to payroll (who was an outside body) but there was no managerial oversight over the Claimant. These people were not the decision makers in respect of salary or terms and conditions, and they had no authority or control over day to day matters.

8. The Tribunal having taken into account all the evidence in this case, we conclude that there is no reasonable prospect of this decision being reconsidered on the grounds set out by the Claimant.

REASONS – REMEDY

Requested by the Respondent.

1. The Tribunal heard evidence from the Claimant, and she told the Tribunal that after dismissal she secured a role in One World (UK) Limited on the 4 September 2017 earning a salary of £42,000. Whilst during her probationary period, Ms. Seymour contacted the Claimant’s new employer and provided them with what we had found in our decision at paragraph 70 to be an unsolicited reference. The Tribunal found this to be a hostile act which resulted in the termination of the Claimant’s employment on the 27 February 2018. The Tribunal therefore conclude on all the evidence that the new employment did not break the chain of causation as employment was terminated due to Ms Seymour’s act and the Respondent should bear responsibility for her losses after termination of this employment. Whilst working for One World the Claimant earned the total sum of £25,847.36.

2. The Claimant was unemployed from February 2018 until she finally secured employment on the 6 September 2019 earning £42,000.

3. The Claimant’s evidence about the steps she took to find employment after her dismissal (from the Respondent’s organization) was that she

signed on with Indeed in 2017 and she took a two day course in counselling. The Claimant secured employment quickly (within 11 weeks) and the Tribunal conclude that there was no failure to mitigate.

4. After the Claimant was dismissed from her new employment, she attended a three day course in how to do business startups on the 23 March 2018. This was a reasonable attempt to mitigate as it looked at alternatives to employment. The Claimant told the Tribunal that when she went for interviews for employment, she was told to await the outcome of her employment Tribunal case. This was one of the reasons that she failed to secure full time employment. The Claimant's evidence on this point was credible and although it was put to her that she could have used what were described as transferrable skills, there was always a risk that Ms Seymour could again have intervened and caused the termination of the new employment. The Claimant told the Tribunal that she applied for some administrative roles but was not successful. When the Claimant was in possession of the Employment Tribunal decision (sent to the parties on the 10 June 2019) the new employer would have a view of the entire factual scenario (which obviously resulted in a favourable outcome for the Claimant as it resulted in her securing a full time role).

5. The Claimant carried out some work on an ad hoc basis doing safeguarding training. She told the Tribunal that she was paid for about 5 sessions receiving £500 per session (receiving approximately £2500).

6. The Claimant did not claim benefits, instead she took out a bridging loan to cover her living expenses over the time of her unemployment.

7. The Claimant said that she incurred significant expenses in looking for work which included driving around looking for venues to set up her own business. The Tribunal noted in the schedule of loss that the expenses claimed were significant, for example the claim for petrol for a 21-month period was £2814, this seemed very high and was not supported by any documentary evidence or any itineraries of trips taken. The Claimant told the Tribunal that she only attended 7 interviews and the Tribunal conclude that expenses to attend interviews could not have been more than £150 to take into account public transport, taxi fares or any incidentals. The Tribunal did not award any money for petrol money as we were unable to quantify what expenses were incurred and took into account that if the travel was into central London the cheapest and most effective method would be public transport.

Submissions- Respondent

8. The submissions made by the Respondent were oral and submitted that they agreed the figure for the basic award but stated that this should be reduced by 50% to £5868.

9. In respect of the compensatory award the Respondent suggested that the approach to take when calculating this is to start with the net figure of one year's losses of £23802.36 then to apply the 50% reduction to this figure. This resulted in a figure of £11,901.18 add the basic award of £5868 equals the total sum of £17769.18. To that they added the ACAS

uplift of 25% of £4442 which resulted in a total figure of £22,211.18. They added to that the total pension losses which were in the region of £286.73 making a total of £22,497.91.

10. The Respondent then referred to the issue of mitigation, they stated that the Claimant was ordered to provide evidence of mitigation by the 8 November, they stated that they wrote to the Claimant on the 11 November saying that nothing had been heard from her. The Respondent stated that the Claimant did not evidence her petrol expenses, travel and parking in respect of job seeking. The Respondent stated that the sum had not been reasonably incurred and they invited the Tribunal to award only £100. They also submitted that the Claimant had not provided evidence that she travelled around looking for business premises.

11. In terms of mitigation the Respondent stated that the Claimant has mitigated her loss in the sum of £15,521.22. However, after dismissal took place the Respondent will say that there could have been further mitigation. The Respondent stated that the compensation awarded to the Claimant should be limited to the sum of £7760 (in respect of the basic and compensatory award).

Submissions – Claimant.

12. The Claimant in oral submissions disputed the fact that the 50% contribution should be applied to the basic award. There had been a detriment to her and her family and what they had gone through. The Claimant stated that she was not sure how they came to the calculations. She was at a loss how they came to the figure of about £7,000 for the basic and compensatory award as she stated that she had been out of work for 2 years. She stated that when she was out of work initially for 2 months, she then lost her job due to the malicious acts of Ms. Seymour. This caused the Claimant to be out of work again and caused her to go into debt. This affected any future role open to her.

13. The Claimant stated that she will accept the figure the Tribunal include for pension.

14. The Claimant stated that she took exception to what the Respondent said about the photographs she had taken of the business premises as she had completed a business case. She stated that the sum of £100 for expenses was laughable.

15. She replied to the point made by the Respondent about not getting in touch saying that she did not receive an email on the 8 November, she stated that she could not find any trace of it. The Claimant stated that she was told to send in her updated schedule of loss, which she did. The Claimant referred the Tribunal to the figures in her schedule of loss.

The Law

Employment Rights Act 1996

118 General

(1) […] where a Tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

> (a) a basic award (calculated in accordance with sections 119 to 122 and 126), and
> (b) a compensatory award (calculated in accordance with sections 123, 124, [124A and 126]).

119 Basic award

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

> (a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
> (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
> (c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) "the appropriate amount" means—

> (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
> (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
> (c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

122 Basic award: reductions

(1) Where the Tribunal finds that the complainant has unreasonably refused an offer by the employer which (if accepted) would have the effect of reinstating the complainant in his employment in all respects as if he had not been dismissed, the Tribunal shall reduce or further reduce the amount of the basic award to such extent as it considers just and equitable having regard to that finding.

(2) Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

123 Compensatory award

(1) 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.

(2) The loss referred to in subsection (1) shall be taken to include—

> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
(b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

[(8) Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.]

124 Limit of compensatory award etc

(1) The amount of—

(a) any compensation awarded to a person under section 117(1) and (2), or
(b) a compensatory award to a person calculated in accordance with section 123,

shall not exceed [the amount specified in subsection (1ZA)].

[(1ZA) The amount specified in this subsection is the lower of—

(a) [£86,444], and
(b) 52 multiplied by a week's pay of the person concerned.]

[(1A) Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105(6A).]

(2) …

(3) In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(4) Where—

(a) a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and
(b) an additional award falls to be made under paragraph (b) of that subsection,

the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards

fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(5) The limit imposed by this section applies to the amount which the [employment Tribunal] would, apart from this section, award in respect of the subject matter of the complaint after taking into account—

(a) any payment made by the Respondent to the complainant in respect of that matter, and
(b) any reduction in the amount of the award required by any enactment or rule of law.

124A Adjustments under the Employment Act 2002

Where an award of compensation for unfair dismissal falls to be—

(a) reduced or increased under [section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards)], or
(b) increased under section 38 of that Act (failure to give statement of employment particulars),

the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).]

Decision

The unanimous decision of the Tribunal is as follows:

16. Turning first to the Basic Award the Respondent has asked that the basic award be also reduced by 50% however they have made no reference to what conduct of the Claimant makes it just and equitable to make the deduction from the basic award. The Tribunal referred to our decision at paragraph 95 on the issue of contribution where we concluded that there should be a reduction of 50% of the compensatory award due to the Claimant's vague and inconsistent evidence that was provided on the one issue of her Friday working. We also took into account the contents of the email to Ms. Seymour dated the 11 January 2017 where she failed to refer to Friday working at all. This was the only reason for attributing fault to the Claimant and to this extent we concluded that under section 123(6) that these facts partly contributed to the dismissal. The Tribunal also spelled out clearly in our decision that the reduction was to apply to the compensatory award only, we made no mention of there being a reduction to the basic award.

17. The power for Tribunals to reduce the amount of a basic award is under section 122(2) which allows a deduction to be made for contribution where "*any conduct of the Claimant before dismissal... was such that it would be just and equitable to reduce…the award*". The Tribunal do not feel that in this case it would be just and equitable to reduce the basic award and no findings of facts were made that suggested that it would be just and equitable to do so. The Tribunal conclude that only the compensatory award should be reduced to reflect the contribution that the conduct had on the decision to dismiss, but it was not sufficiently serious to warrant reducing the basic award. The Tribunal referred back to our decision where we recorded that there was fault on both sides on this

point, the Respondent having little or no controls or supervision of the Claimant by two successive line managers over a period of many years. The Tribunal also concluded in robust terms that the Respondent carried out a fundamentally unfair process and it was impossible to determine whether the process was capable of reaching a fair outcome which was reflected in our decision at paragraph 94. We also recorded in that same paragraph that the first independent disciplinary procedure concluded that the Claimant should face no sanction and then the second unfair process reached a decision that was unsustainable on the facts and reflected Ms. Seymour's predetermined subjective beliefs. The Tribunal have seen no evidence that should result in a reduction being made from the basic award, we therefore award to the Claimant the full basic award of **£11,736** without any deduction.

18. Turning to the compensatory award the Claimant was unemployed from the 19 June until the 4 September 2017, this was a period of 11 weeks. The Claimant was then dismissed because of the intervention of Ms. Seymour when she provided an unsolicited reference and we referred to this in our decision at paragraph 70. The termination of employment was caused by Ms. Seymour's uninvited comments and we therefore do not conclude that there was a break in the chain of causation and award to the Claimant the losses from the 28 February 2018 until she secured full time employment on the 6 September 2019. We calculate that to be a total of 79 weeks in all. The total number of weeks the Claimant was unemployed due to the unfair dismissal was 90 weeks.

19. To calculate the Claimant's net weekly wage, we took her annual salary of £23,802.36/52 = **£457.74**.

20. To calculate total losses from the date of termination to the date of this hearing was a total of 90 weeks x £457.74 = **£41,196.60**.

21. We uplifted the sum of £41,196.60 x 25% in respect of the failure to comply with the ACAS Code of Practice under section 124A Employment Rights Act. This took the total sum to **£51,495.75**.

22. We then reduced that sum by 50% reduction for contributary fault under section 126(6) of the Employment Rights Act which makes the total sum of **£25,747.88**.

23. We add to this loss of statutory rights of £500, her expenses of £150 and the employers pension contributions into her stakeholder scheme of £870.75. The total sum of non-recoupable expenses are **£1520.75**.

24. The total non-recoupable expenses of £1520.75 were then added to the above figure of £25,747.88 which made the total figure **£27268.63**.

25. We then applied the statutory cap to this figure and arrived at the sum for the compensatory award of **£23802.36**.

26. The total figure awarded to the Claimant in respect of the basic and compensatory award is **£35,538.36.**

Reconsideration of the Tribunal's own motion

27. After the close of the hearing, the Tribunal realized that in error we had failed to give credit for the Claimant's earnings whilst unemployed for the second period of time. The Claimant told the Tribunal she had earned £2500 which in error we failed to deduct from the total losses. The Tribunal therefore decided that it would be appropriate to reconsider the decision of our own motion under rule 73.

28. We have recalculated the figures as follows:

Compensatory Award

Total losses from date of dismissal to date of hearing		**£41,196.60**
Less: earnings		£2500.00
Total		**£38,696.60**
Add uplift under Section 124A of 25%		£9,674.15
Total		**£48,370.75**
Reduce by 50%		£24,185.38
Total		£24,185.37
Add:		
Loss of statutory rights	£500.00	
Expenses	£150.00	
Pension Contributions	£870.75	
Total		£1520.75
Total compensatory award		**£25,706.12**

29. Subject the compensatory award to the statutory cap, results in the total sum of **£23802.36**. Having carried out this exercise, we conclude that our error does not result in a different figure and we confirm our figure for the compensatory award subject only to the different calculation as set out above.

Employment Judge **Sage**

Date: 9 December 2019