EMPLOYMENT TRIBUNALS

First Claimant: Ms S Teji

Second Claimant: Mr R Tyler

Respondent: William Moore trading as Bales College

Heard at: London Central Employment Tribunal **On:** 24 January 2020

Before: Employment Judge K Welch

Representation
Claimant: Mr S Thakkarar, Counsel
Respondent: Mr T Goodwin, Counsel

RESERVED REMEDY JUDGMENT

The Judgment of the Tribunal is that:

1. **The Respondent is ordered to pay the First Claimant the total sum of £19,220.20 in respect of:**
    a. **Compensation for unfair dismissal in the sum of £13,354 made up of:**
        i. **a basic award of £12,954.00;**
        ii. **a compensatory award of £400.00; and**
    b. **Damages for wrongful dismissal in the sum of £5,866.20 net of tax.**

2. **The Respondent is ordered to pay the Second Claimant the total sum of £28,935.99 in respect of:**
    a. **Compensation for unfair dismissal in the sum of £28,935.99 made up of:**
        i. **a basic award of £6,858.00; and**
        ii. **a compensatory award of £22,077.99.**
    b. **No award is made in respect of the Second Claimant's wrongful dismissal complaint.**
3. **The recoupment regulations do not apply.**

RESERVED REASONS

Background

1. The matter originally came before me on 30 and 31 October 2019 which resulted in a reserved judgment being sent to the parties on 5 November 2019. The parties attended a remedy hearing on 24 January 2020 concerning the successful complaints of unfair dismissal and wrongful dismissal in respect of both of the Claimants. Both Claimants confirmed at the start of the remedy hearing that they were not seeking reinstatement or reengagement by the Respondent.
2. Oral evidence was given by the Second Claimant (Mr Tyler) only.
3. It was conceded by the Respondent that the basic awards claimed in the schedules of loss prepared for the both Claimants were correct and, subject to the Respondent contending that there should be a deduction in respect of contributory conduct in respect of the Second Claimant's basic award, the amounts were agreed in principle.

Findings of fact relevant to the remedy hearing.

4. The First Claimant's net weekly pay was £488.85 and the Second Claimant's was £485.17. Whilst the Respondent sought to challenge the weeks' pay submitted by the Claimants, no sworn evidence was adduced to confirm what the net weekly pay should be, and I am therefore basing my calculations on the weekly pay set out in the schedule of loss.
5. The First Claimant was off sick from the commencement of the limited term contract (3 September 2018) until her dismissal on 29 October 2018. She therefore never worked under the latest limited term contract. She remained signed off as unfit to work until 29 October 2019.
6. The Second Respondent was in a position to return to work from 26 November 2018.
7. The Claimants were both entitled to receive statutory notice in accordance with section 86 Employment Rights Act 1996 ('ERA') which was 12 weeks for the First Claimant and 9 weeks for the Second Claimant.
8. The Second Claimant mitigated his losses in the sum of £13,397.14 to the date of the remedy hearing.

Submissions

9. Both parties provided written submissions and were given the opportunity to expand upon them orally.
10. In brief, the Respondent's submissions were that there was no jurisdiction to award any sum in respect of any losses incurred prior to the date of the dismissal on the basis that the Claimants had withdrawn their unlawful deduction claims. As far as unfair dismissal was concerned, the basic awards were accepted, subject to the Second Claimant's contributory conduct, which they considered should reduce this to zero. As far as compensatory awards were concerned, in respect of the First Claimant, there was no entitlement to contractual sick pay and no entitlement to statutory sick pay and therefore, as the Claimant had been signed off as unfit to work until at least 31 October 2019, no amount should be awarded in respect of the Claimant's compensatory award.
11. In respect of the Second Claimant, the Respondent contended that he had failed to attend work, that he would not have returned to work and therefore no compensatory award should be made. If, contrary to this, an award is to be made then a Polkey reduction of up to 100%, together with a reduction due to the Second Claimant's culpable and blameworthy conduct should be made such that no compensatory award should be payable.
12. As far as wrongful dismissal was concerned, the notice pay should not be payable in respect of the Second Claimant, since he was not ready and willing to work.

13. For the First Claimant, under the authority in Burlo v Langley [2007] ICR390, Statutory Sick Pay ('SSP') would be the correct measure of her weekly loss during the notice period (should she be entitled to it).
14. In respect of the Second Claimant, the Respondent considered that, as he had been unable and unwilling to work when work was available, this meant that he was not entitled to notice pay.
15. The Respondent contended that there should not be an uplift in respect of any failure to follow the ACAS Code of Practice by the Respondent as this did not apply to dismissals for ill health and/or some other substantial reason.
16. Finally the Respondent contended that a reduction should be made in the award for the Claimants' failure to follow the ACAS code of practice in respect of grievances.
17. The Claimants' submissions were that there should be no deduction to the sums awarded under Polkey principles. There was no contributory fault by the Second Claimant (it being accepted that the First Respondent had not committed any contributory fault).
18. In relation to the statutory sick pay entitlement prior to dismissal, the Claimant considered that the admission by the Respondent in the response to the Tribunal meant that these sums should be payable. However, no further argument was put forward concerning the provisions of the Social Security Act and its application to SSP being payable in these circumstances.

Law

19. In respect of the compensation for unfair dismissal, I had regard to Section 122(2) and 123 of the ERA which provides:

"**Section 122.— Basic award: reductions**.

(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.

20. Section 123 ERA provides:

"**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….

(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."

21. I had regard to Nelson v British Broadcasting Corporation [1980] ICR110 which is a Court of Appeal decision. That case states at page 121 paragraph (f): "It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection, the concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or at all. It includes, no doubt, conduct of that kind but it also includes conduct which while not amounting to a breach of contract or at all, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative epithets is nevertheless unreasonable in all the circumstances….in order to justify the reduction of Mr Nelson's compensation which they made, to make three findings as follows. First a finding that there was conduct of Mr Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to some extent by that conduct. Thirdly, that it was just and equitable,

having regard to the first and second findings, to reduce the assessment of Mr Nelson's loss by 60%."

22. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

"**207A Effect of failure to comply with Code: adjustment of awards**

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes."

23. I noted that the uplift only applies to cases to which the ACAS Code of Practice on disciplinary and grievance procedures applies. It was accepted by the Claimants that this would not apply in respect of the First Claimant's claim.

24. I also had regard to Schedule 11 of the Social Security Contributions & Benefits Act 1992 which provides:

"**Circumstances in which periods of entitlement to statutory sick pay do not arise**

1. A period of entitlement does not arise in relation to a particular period of incapacity for work in any of the circumstances set out in paragraph 2 below or in such other circumstances as may be prescribed.

2. The circumstances are that–…

(f) the employee has done no work for his employer under his contract of service;…"

25. I was also referred to HM Revenue & Customs Statutory Payments Manual regarding the payment of SSP which states

"special cases - educational and term time workers…

If the first day of the employee's PIW is when their new contract would have started, there is no entitlement to SSP as they have not done any work for their employer under that contract…

If the employee signs a new contract, for example at the start of a new term, they will be entitled to SSP when they have done some work under the new contract.."

26. Whilst the Statutory Payments Manual is not binding, it supports the Respondent's contention of what Schedule 11 of the Social Security Contributions & Benefits Act 1992 suggests, namely that no SSP is payable should an employee not commence employment under a new contract.

27. In respect of the Claimants' wrongful dismissal claims, I had regard to Sections 86 to 91 of the ERA.

"**Section 86.— Rights of employer and employee to minimum notice**.

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more…

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

28. **"Section 87.— Rights of employee in period of notice.**

(1) If an employer gives notice to terminate the contract of employment of a person who has been continuously employed for one month or more, the provisions of sections 88 to 91 have effect as respects the liability of the employer for the period of notice required by section 86(1)…

(3) In sections 88 to 91"period of notice" means—

(a) where notice is given by an employer, the period of notice required by section 86(1),…

(4) This section does not apply in relation to a notice given by the employer or the employee if the notice to be given by the employer to terminate the contract must be at least one week more than the notice required by section 86(1)."

29. **"Section 88.— Employments with normal working hours.**

(1) If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours—

(a) the employee is ready and willing to work but no work is provided for him by his employer,

(b) the employee is incapable of work because of sickness or injury,

(c) the employee is absent from work wholly or partly because of pregnancy or childbirth or on adoption leave, shared parental leave, parental bereavement leave, parental leave or paternity leave , or

(d) the employee is absent from work in accordance with the terms of his employment relating to holidays,

the employer is liable to pay the employee for the part of normal working hours covered by any of paragraphs (a), (b), (c) and (d) a sum not less than the amount of remuneration for that part of normal working hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of normal working hours."

30. I was referred to Langley and another v Burlo [2006] EWCA civ 1778 which is a Court of Appeal authority in relation to the assessment of compensation for unfair dismissal relating to a period of notice where in that case the Claimant was only entitled to sick pay and not full pay. However, this case could be distinguished on the basis that Section 87(4) ERA was dis-applied to the Clamant in that case due to her contractual notice being more than a week longer than the statutory notice required by Section 86. In this case, the Claimants' notice is statutory notice only.

Conclusions

31. Having previously found as a matter of fact that the First Claimant was dismissed on 29 October 2018 and the Second Claimant on 31 October 2018, I had to consider what compensation was payable in respect of their successful claims of unfair dismissal and wrongful dismissal.
32. As the Claimants had withdrawn their claims for unlawful deductions from wages, I was not in a position to award any compensation relating to payments prior to their dismissals (eg SSP for the First Claimant).

33. As far as the First Claimant is concerned, I am satisfied that she remained unfit to work until at least 31 October 2019. As such, I consider that at some point she would have been dismissed by the Respondent on capability grounds. As the Claimant remained unfit for work and as she was not entitled to any sick pay, her losses during the period from the date of her dismissal (29 October 2018) until when she could have been dismissed fairly (at some point between 29 October 2018 and 31 October 2019), her loss of earnings would be nothing. Therefore, the only amount I am awarding in respect of the compensatory award for the First Claimant is the sum of £400.00 in respect of the loss of her statutory rights. I am not convinced that because the Respondent may have dismissed the Claimant at some point, she has not suffered the loss of statutory rights and therefore award this in her favour.
34. I also consider that there should be no uplift of compensation in respect of the failure to follow the ACAS Code of Practice, since this would not have applied in the First Claimant's case.
35. As regards the First Claimant's wrongful dismissal complaint, I am not satisfied by the authority of Langley and another v Burlo and consider that Section 91(5) ERA provides that I am entitled on a wrongful dismissal claim to award full pay in accordance with Sections 86 to 91 ERA. Therefore, I award the First Claimant the sum of 12 weeks' net pay in the total sum of £5,866.20.
36. Turning now to the Second Claimant, I am satisfied that he is entitled to a basic award of £6,858.00 and that there should be no deduction in respect of either the basic or compensatory award in respect of contribution under Sections 122(2) or 123 (6) ERA. Whilst I accept that the Second Claimant was unavailable for work, I do not consider that that constituted blameworthy conduct as outlined in *Nelson v British Broadcasting Corporation [1980] ICR110* for which a deduction for contribution should be made.
37. Whilst the Second Claimant's failure to attend work may have contributed to his dismissal, I firstly do not find that that is blameworthy conduct as outlined in the Nelson v BBC case referred to above. In any event, I do not consider it just and equitable for any such deduction to be made to the compensatory and/or basic awards in respect of the Second Claimant's unfair dismissal compensation.
38. Therefore, I am satisfied that the Second Claimant is entitled to a basic award in the sum of £6,858.00.
39. Turning to the compensatory award for the Second Claimant, the Second Claimant gave evidence that the earliest he would have returned to work would have been six to eight weeks from the First Claimant's operation which took place on 1 October 2018.
40. Having taken the eight-week period, I calculate that Mr Tyler would have returned to work, had he not been unfairly dismissed, on 26 November 2018. I do not accept the Respondent's assertion that he would not have returned to work. This meant that the Second Claimant had lost 61 weeks of net pay (from 26 November until 24 January 2020), which totals £29,595.37.
41. Mr Tyler had attempted to mitigate his losses by doing supply work and registering with three agencies such that, at the date of the original Tribunal hearing, he had earnt the sum of £10,106.74 together with a further £3,290.40 since the date of the first Tribunal hearing and prior to the remedy hearing. This resulted in a total amount in respect of mitigation for past losses in the sum of £13,397.14.
42. I considered the Respondent's contention that the Second Claimant had failed to mitigate his losses. However, in light of his registering with three agencies local to where he lives, and his confirmation of the mitigation he had made, in the absence of any evidence from the Respondent relating to available jobs and the salaries payable for those roles, I do not accept that the Second Claimant has failed to mitigate his losses. I therefore award the Second Claimant losses from 26 November 2018 to 24 January 2020 (being the date of the remedy hearing). I calculate this to be 61 weeks at the Second Claimant's net pay of £485.17 together with a further four weeks' of losses representing future losses by which time I would suggest that the Second Claimant would be able to obtain alternative work. This means that past loss of

earnings amount to £29,595.37 less mitigation of £13,397.14 leaving a total of £16,198.23 for past loss of earnings.

43. For future losses, as stated above I am awarding a further four weeks' of loss namely £1,940.68 less estimated mitigation of £876.52. Therefore, total future losses are £1,064.16
44. I also consider that the Claimant is entitled to a loss of statutory rights in the sum of £400.00.
45. Additionally, in respect of the Second Claimant's unfair dismissal award, I am exercising my discretion to award a 25% uplift in respect of the compensatory award due to the Respondent's complete failure to follow the ACAS Code of Practice on Discipline and Grievance. The Respondent's failure to engage in this process means that I award an uplift in the sum of £4,415.60 making the total compensatory award for the Second Clamant £22,077.99. The statutory cap of one year's gross pay makes no difference the amount awarded.
46. There is no deduction for recoupment of benefits since the Claimants gave evidence that no benefits had been received since either Claimant's dismissal.
47. Turning finally to the wrongful dismissal claim for the Second Claimant, at the date of the Claimant's dismissal, namely 31 October 2018, the Second Claimant was not in a position to attend work and therefore the provisions of Section 86 to 91 ERA do not apply. Therefore he is only entitled to be paid for the work done. Therefore, no award is made in respect of the Second Claimant's wrongful dismissal complaint.

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Employment Judge Welch

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Date 10 February 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

10/02/2020

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FOR THE TRIBUNAL OFFICE