EMPLOYMENT TRIBUNALS

Claimants: **Miss H Kalaya**

Respondent: **Wimbledon Broadway Specsavers Limited**

Heard at: **London South Croydon Hearing Centre**

On: **25 September 2019**

Before: **Employment Judge John Crosfill**
Ms J Forecast
Ms M Foster-Norman

Representation

Claimant: **In person (with assistance)**

Respondent: **Orlando Holloway of Counsel**

JUDGMENT

(1) The Claimant is entitled to a basic award under section 119 of the Employment Rights Act 1996 of £1769.60

(2) The Claimant is entitled to a compensatory award of £176.96 under section 123 of the Employment Rights Act 1996.

(3) The Respondent is ordered to pay the Claimant (if it has not already done so) the sum of £1,946.56

(4) the Recoupment Regulations do not apply to these awards.

REASONS

1. The Claimant had brought a large number of claims in three separate claim forms against the Respondent and others. By our liability judgment dated 31 May 2019 we dismissed all the Claimant's claims except for her claim for unfair dismissal which, by a majority, we concluded was well founded. The hearing on 25 September 2019 was listed to deal with the issues of remedy only as against Wimbledon Broadway Specsavers Limited.

2. The Claimant had provided a schedule of loss. The Respondent had prepared a counter schedule. The Claimant did not seek re-instatement or re-engagement. At the

outset of the hearing we discussed what the remaining issues were. We discussed the following points

2.1. The Respondent accepted that the Claimant was entitled to a basic award and Mr Holloway indicated that he was not instructed to argue that that award should be reduced on account of any of the Claimant's conduct. The basic award was agreed to be £1769.60.

2.2. It was common ground that the Claimant's employment ended on 4 April 2017 and that she started work with a new employer on 6 April 2017. The Respondent accepted that it was liable to compensate the Claimant for the period between these two dates and had agreed the sum proposed by the Claimant which was £178.96. As a matter of fact, that is the gross sum whereas the loss would ordinarily be calculated net. Calculating the net sum would be complicated by the fact that the Claimant made a 45% contribution to her pension and also received some other benefits. Calculation of loss may be conducted with a broad brush and we saw no good reason to go behind the figure that had been accepted, which is likely to be within a few pounds of the sum agreed.

3. The Claimant's schedule of loss sought some remedies that are not available in a claim of unfair dismissal. In particular, she sought:

3.1. Recommendations

3.2. A room in which to give a press conference to the media

3.3. The 'right' to write a book about her experiences.

4. We explained to the Claimant that we were unable to deal with any of these matters. Our liability judgment does draw attention to matters where the Respondent might seek to draw lessons but that is the limit of our powers to make recommendations. The Claimant is free to seek such publicity as she wants in this matter. Whether that is sensible is a matter for her.

5. We then ascertained what else was in dispute. 6 matters emerged. These were:

5.1. Whether the Claimant was entitled to an award for loss of statutory rights and if so in what amount?

5.2. Whether the Claimant was entitled to 'notice pay'?

5.3. Whether the Claimant had continued loss of earnings or benefits from the point at which she got a new job?

5.4. Whether the Claimant had suffered a further loss of earnings for the first three days of her new job?

5.5. Whether the Claimant should be awarded a sum to reflect the disadvantage she would experience in the future by reason of her dismissal and the resulting proceedings?

5.6. Whether she should be awarded the cost of medical treatment (past and future)?

6. Whilst some of the issues did not require live evidence, having ascertained that the Claimant was claiming what is commonly known as 'stigma damages' we invited the Claimant to give such evidence as she wished to give on that point. In fact, we did not limit the evidence in any way. Having heard the evidence, we invited the parties to make submissions in respect of the points identified above. We then deliberated over the time that remained and into our usual lunch break. The Employment Judge then dealt with the case management matters in the Claimant's fourth claim that had been listed for 14:00 and then after some further deliberation with the full panel we reconvened. Just before we delivered our judgment, the Claimant sought to put some further information before us as to the benefits she had received in her employment. She suggested that this meant that she continued to suffer loss. We briefly considered her points, but they did not alter our conclusions set out below. We then delivered our judgment on each of the disputed issues. The Claimant was concerned that we had not recorded the proceedings. The Employment Judge explained that he intended to provide full written reasons for our decisions and that these would serve as the definitive record of our reasons.

7. After the hearing the Claimant has sent the Tribunal further documentation. There is nothing within those documents that would have made any difference to our decision.

8. In the remaining parts of this judgment we deal with the contentious issues that we were invited to decide. We include the relevant law under each heading.

Loss of statutory rights

9. When making any compensatory award under section 123 of the Employment Rights Act 1996 a tribunal should consider making an award for loss of statutory rights. The Respondent in its correspondence and counter schedule had agree in principle that this should be considered in this case. The Claimant contended that she should be awarded £1,000. The Respondent suggested a lesser sum. When the employment judge queried the basis for making any award for loss of statutory rights Mr Holloway argued that it was inappropriate to make any award. No formal concession had been made and we entertained that argument.

10. An award for loss of statutory rights is made on the assumption that a Claimant enjoyed various statutory rights in her old employment, but, having been dismissed and because of requirements to have qualifying service (two years for unfair dismissal) there is a risk that they might be dismissed by a new employer and if they had not accrued the qualifying service be unable to present a claim in respect of that dismissal (or other infringement). It is conventional to award a sum of 1 weeks' pay (or thereabouts) to compensate for that contingency ***Norton Tool Co Ltd v Tewson*** **1972 ICR 501**. In some cases, an employee will point to the loss of a statutory or contractual right to long notice. This may lead to separate award or more commonly be considered in calculating the amount of any award for loss of statutory rights. A tribunal is not obliged to award compensation for loss of statutory rights but must explain why it does not do so.

11. In the Claimant's case she had obtained alternative employment on 6 April 2017. By the time of the hearing before us she had all the statutory employment rights that she enjoyed with the Respondent. In her new employment, upon successful completion of her probation period, she was entitled to 3 months' notice if her employment was terminated. That is the same notice period that applied when employed by the Respondent.

12. Section 123 of the Employment Rights Act 1996 requires a tribunal to award such sums as are just and equitable. If we made an award for loss of statutory rights or loss of a long notice period, then we would be compensating the Claimant for a contingency that we know has not occurred. We do not consider that in those circumstances it would be just and equitable to make any award under this heading. Insofar as the Respondent had conceded that it would be appropriate we consider it appropriate to allow Mr Holloway to withdraw that concession as it was based on a mistaken view of the purpose of any such award.

The right to notice pay

13. The Claimant suggested in her schedule of loss that she should be awarded the sum that she would have received in notice pay (3 months' pay). She did not explain the legal basis for this claim other than she had been entitled to treat herself as dismissed without notice.

14. The claimant had not brought a wrongful dismissal claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. If she had she would have had to give credit for all sums received in mitigation of loss. Other than for the first two days she has earned more in her new job than she did in her old job. As such she had suffered no loss for that later period. Our findings about that are found below.

15. It became apparent that the Claimant was arguing that she ought not be required to give any credit for sums that she has earned during what would have been the notice period had she not resigned summarily. In ***Norton Tool Co Ltd v Tewson*** it was held that an Employment Tribunal was not constrained by ordinary common law principles when assessing loss. Good industrial practice required an employer who dismissed without notice to make a payment in lieu of notice. The employment tribunal should compensate loss having regard to what was good industrial practice and should not require an employee to give credit for sums earned during any notice period. That decision has been criticised but remains good law where it is the employer who expressly dismisses the employee. That principle does not apply where the employee resigns (as in this case) because there is no 'good industrial practice' of paying an employee in lieu of notice in those circumstances see - ***Stuart Peters Ltd v Bell*** **2009 ICR 1556**.

16. We therefore accept the Respondent's argument that the Claimant should give credit for any sums earned during her notice period. As we set out below those were sufficient to extinguish any loss.

Continuing loss of earnings

17. The Claimant argued that the value of her pay and benefits with the Respondent, including the value of any benefits, exceeded the pay and benefits of her new job. It was that argument that she renewed before us shortly before we delivered our judgment.

18. The Claimant sought to differentiate between the pay she received directly and her pension contributions. As set out above the Claimant took the unusual (but very prudent) step of paying 45% of her salary into the Specsavers pension scheme. We understood her to be inviting us to disregard her pension contributions when looking at what she was earning from her new employment. That is not the proper approach.

19. It was necessary for us to assess what the Claimant would have received had she remained in the Respondent's employment and compare that with what she has received since she left. We need to take into account the value of all benefits in kind and have regard to any pay increase the Claimant received. Our findings are set out below.

20. At the time of her dismissal (4 April 2017) the Claimant had a gross salary of £23,000. She says she could have expected salary increases each April of £1,000. The Respondent had agreed to increase the Claimant's pay in 2017 to £24,000 but there was no evidence that this would automatically be the case each year. The Claimant had the benefit of an insurance plan which provided cover for dental and medical treatment subject to limits within the policy. The Respondent made employers contributions of 5% of salary. The Respondent paid her professional registration fee. The Claimant was allowed one pair of free glasses per year.

21. In her new employment the Claimant started on a salary of £27,000. In September 2018 that increased to £27,810 per annum. The Claimant receives bonuses on a regular basis of between £30-40 per month. Her new employers have enrolled her into a pension scheme and make the minimum contributions required by law that is 1% in 2017, 2% in 2018 and 3% from April 2019. It appears that it took some months to start paying the 1% contributions. We have ignored these in our calculations. In common with the Respondent the new employer paid the Claimant's professional registration fee.

22. We have looked at the question of loss only up to April 2020 three years after the employment ended. During the liability hearing the Claimant told us that she kept a constant look out for employment opportunities. She has continued to do so with her current employer. We find that the Claimant would not have remained with the Respondent for any more than a further 3 years and that that is the point beyond which it is inappropriate to speculate about future loss. If we are wrong about that then there is no evidence that the Claimant will suffer any loss beyond that date.

23. If the Claimant is correct and that she would have got a pay rise of £1000 each year the total gross remuneration she would have received from the Respondent in each year to April 2020 would be:

    23.1. April 2017 – April 2018 £24,000 x 105% (to include ER contributions) = £25,200

    23.2. April 2018 – April 2019 £25,000 x 105% = £26,250

    23.3. April 2019 – April 2020 = £26,000 x 105% = £27,300.

    23.4. A Total of **£78,750**

24. In her new employment the Claimant assuming that the Claimant gets no further pay rise she has or can be expected to receive:

    24.1. April 2017 – April 2018 (ignoring pension in that year) = £27,000

    24.2. April 2018 – April 2019 £27,405 (6 mths at £27,000 and 6 mths at £27,810) x 102% = £27,952.10

    24.3. April 2019 – April 2020 at £27,810 x 103% = £28,644.30

24.4. A total of **£83,596.40**

25. The tax treatment of the Claimant's income would remain the same in her old and new employment. In assessing whether the Claimant has suffered any loss that can be answered by looking at gross income. Our calculations above show that the Claimant has received £4,846.40 more in salary and employers pension contributions in her new job as she would have if she had remained with the Respondent (making assumptions about pay favourable to the Claimant and ignoring the small bonusses she receives). The only benefit in kind that this calculation does not include is the value of the insurance benefits that the Claimant enjoyed and the value of one pair of glasses.

26. There are two possible approaches to the valuation of an insurance benefit. The most common is to look at the cost of obtaining that benefit elsewhere. However, that may not be appropriate where the insured event has taken place and had the benefit been in place the insurer would have made a payment or conferred some valuable benefit see ***Fox v British Airways plc*** **2013 ICR 1257, CA**. We look at each possibility.

27. We were not told the value of the various insurance benefits received by the Claimant (assuming that no claims were made – dealt with below). We have had regard to the schedule we were provided with and note that the cover is very basic indeed. Such an insurance is a taxable benefit. We were not provided with a P11D. As such it is difficult for us to assess any loss. It is for the Claimant to prove her case in respect of this. She would have an annual statement (P11D) of the value of this benefit. In order to demonstrate any loss, the Claimant would need to show that the value of this benefit, after tax, was in excess of £4,846.40 over 3 years. We find it more likely than not that the cost of an equivalent policy would be less (and indeed far less) than this sum. On that basis the Claimant has not suffered any loss (other than the 2 days admitted) as a result of her dismissal.

28. The alternative value of this benefit is the value of the services that would have been provided to the Claimant after any insured event. The Claimant said that the plan covered dental treatment and said that she had had to pay for treatment that was otherwise covered. The Claimant had not provided any evidence of any expenditure at the hearing but did so after we had given judgment. We had regard to the terms of the policy. They provided for the costs of routine dental treatment of up to £150 per year and emergency treatment up to £400 per year. There is provision for dental injury but the Claimant's condition is not caused by an injury. £40 per year is available to meet prescription charges. We found that had the Claimant had all the benefits available for dental treatment she would not have incurred loss of £4,846.40 over 3 years. In fact, when the Claimant sent in receipts she has spent only a few hundreds of pounds both on treatment and spectacles. Assuming that the Claimant might claim in addition the value of the insurance we are still satisfied that the total value of the benefit would be less than she has obtained in her new employment.

29. For the reasons set out above the Claimant has not shown that she has suffered any financial loss up to or beyond the date of the Tribunal hearing in respect of loss of wages or benefits. She is in fact marginally financially better off as a consequence of her dismissal.

Loss for three days after the Claimant started her employment

30. The Claimant's first payslip with her new employer shows a deduction of £311.54 the Claimant says that this is because she had to go home on the first day of her employment. He says that the Respondent is responsible for this loss.

31. We have looked at the Claimant payslip for the payday 28 April 2017. It does show a deduction of three days' pay as a salary adjustment. We find that the Claimant has simply misunderstood her payslip. The basic salary that is paid is £2,250.00 which is 1/12 of the annual salary. The adjustment is to deduct the days in April prior to the Claimant's employment with her new employer. It is the monthly salary that is adjusted and there is no adjustment for any absence whether through sickness or otherwise. We are satisfied that the Claimant was paid her new salary from the day she was due to start rather than any postponed date. As such reject the Claimant's claim for loss in this regard.

Career damage

32. In her schedule of loss the Claimant had claimed the sum of £12,000 for 'damages'. At the outset of the hearing she explained that she believed that she had suffered damage to her ability to progress her career. Suggested that as Spec Savers was one of the largest opticians in the United Kingdom her prospects of progressing further were damaged. The Claimant said she had applied that other jobs but had not obtained them. Mr Holloway on behalf of the Respondent acknowledge the theoretical possibility of obtaining what usually referred to as stigma damages but suggested they were inappropriate in the present case.

33. The Claimant gave evidence. She told us that she had applied for several jobs and whilst she had been successful in obtaining interviews for most she had not been appointed. She did not provide any evidence that she had discussed her reasons for leaving the Respondents employment with any prospective employer.

34. Harvey on Industrial Relations and Employment Law includes the following passage which we accept as setting out the proper approach to this issue:

> *A Tribunal is entitled to take account of a claim of loss consisting of difficulty in obtaining or keeping employment due to 'stigma', particularly where the stigma consists not of taking unjustified proceedings, but successful ones against a former employer. In considering such a claim it is necessary to ask whether, in relation to finding re-employment, stigma from the former employee's employment had (a) a real or substantial effect, and (b) if it did, how great an effect. In answering that question, it is appropriate to have regard to the entire history of the former employee's search for new employment, including the number of jobs applied for, how well targeted and presented the applications had been, the number of interviews obtained, how they had gone and any reasons given for rejection. In Ur-Rehman v Ahmad (on behalf of Doncaster Jamia Mosque) [2013] ICR 28 the EAT noted that a suggestion or suspicion that stigma might be at work is not enough. However, just as with discrimination, stigma may be inferred provided there is a sound evidential foundation from which the inference may be drawn. Loss arising from any such stigma does not constitute a separate head of compensation but is merely one factor in the overall assessment of future loss of earnings. This is important as compensation for unfair dismissal may not include damages for the manner of dismissal and/or injury to feelings (see DI [2629]), so that any generalised ideas of stigma are impermissible and the basis of compensation remains financial loss.*

35. What we take from this passage is that it is possible for an employee to argue that the fact that they have been dismissed and brought justify proceedings to seek redress might be the cause of future loss. We see no reason in principle why that should not include loss of a possibility to progress in a career.

36. What is clear both from the passage quoted and from the case law identified is that any finding that there has been damage to career prospects must be supported by evidence not merely by suspicion.

37. The Claimant was initially able to obtain better paid employment without any difficulty at all. Since then she has obtained a number of interviews. The Claimant was not able to provide any evidence which would support an inference that the reason she did not obtain any of the jobs she applied for was because she was dismissed or had brought the present proceedings.

38. We would accept that now tribunal judgements are published on the Internet there is a risk that employers might avoid employing individuals who had previously sued their employers. That general proposition does not provide any real support for the Claimant's claim. We would accept that in the Claimant's case a prospective employer reading our liability decision might be troubled by some of our findings about the Claimant's behaviour. The Claimant brought several hundred claims which failed. We consider it quite impossible to infer that a prospective employer would be put off by the justified claim of unfair dismissal as opposed to the claims we have found were without foundation.

39. The Claimant argued a discreet point that SpecSavers joint partnership model had a large market share. The reality is that that still leaves an awful lot of opticians where the Claimant might seek employment if she believed that she was unable to work for another SpecSaver branch.

40. The Claimant has had no difficulty obtaining interviews. The small number of jobs that the Claimant was able to tell us about which she did not obtain provides no sufficient evidential basis for inferring that any stigma arising from her dismissal or these proceedings has had any effect on her ability to find work. Whilst there was no dispute before us that the Claimant was a conscientious optician we have made findings about her personality in the workplace which support the proposition that she is not easy to work with. The Claimant told us that when rejected from one job she was told that she would not be a good fit. It is quite impossible for us to infer that this was because of her dismissal or proceedings in circumstances where we have found that she sometimes presented herself in a way that others perceived as difficult or abrasive.

41. We find that there is no evidential basis to make an award of future loss based on stigma causing a loss of chance of promotion or career advancement.

Medical Costs

42. The Claimant in her schedule of loss sought £20,000 for "Medical Treatment, Counselling Therapy for CUD". She had not yet had that treatment.

43. An Employment Tribunal may only make an award under Section 123 of the Employment Rights Act 1996 where the loss claimed flows from the dismissal itself. If the dismissal has caused a medical condition to arise then in principle the costs of treating that condition might be recoverable. However insofar as any medical condition is caused by the employer's antecedent breaches of the implied term of trust and confidence which had caused the employee to become ill that medical condition did

not arise from the dismissal itself which took effect only at the date of resignation see ***GAB Robins (UK) Ltd v Triggs*** **[2008] I.R.L.R. 317** and ***Eastwood v Magnox Electric Plc*** **[2005] 1 A.C. 503**.

44. It is the Claimant's case that she fell ill in response to being invited to a disciplinary hearing that took place many months before her dismissal. It is quite impossible for her to argue that her health condition arose as a consequence of the dismissal. She has not provided any evidence that her health condition has been exacerbated by the dismissal. There is no medical evidence placed before us to support that proposition.

45. For these reasons it is not open to us, nor would we consider it just and equitable, to require the Respondent to compensate the Claimant for the cost of any medical treatment.

46. As a final matter the Claimant has referred to an uplift in compensation because of a failure to follow a provision of the relevant ACAS code of practice. The Claimant has not identified any such failure and indeed our findings in the liability judgment would not support any such claim. We do not make any such uplift.

47. It follows from the above that the basic award payable is £1769.60 and the compensatory award is limited to the agreed sum of £178.96.

48. The Claimant has not been a receipt of benefits during the period of loss and the Recoupment Regulations do not apply

Employment Judge John Crosfill

Date 3 December 2019