EMPLOYMENT TRIBUNALS

Claimant: Miss E Corpuz

Respondent: Hilbre Care Limited

Heard at: Manchester **On:** 29 November 2019

Before: Employment Judge Horne
Mrs J L Pennie
Mr P Gates

REPRESENTATION:

Claimant: Mr J Jenkins, Counsel
Respondent: Mr W Lane, Solicitor

JUDGMENT on remedy having been sent to the parties on 19 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The liability judgment

1. By a reserved judgment sent to the parties on 18 June 2019 ("the liability judgment"), the tribunal declared that the respondent had unfairly constructively dismissed the claimant and had made unlawful deductions from the claimant's wages. By paragraph 3 of the liability judgment, the tribunal recorded its finding that, had the claimant not been constructively dismissed, she would have remained employed by the respondent. The liability judgment was accompanied by written reasons ("the liability reasons").

Remedy issues

2. Prior to the hearing, the parties' representatives cooperated well in seeking to narrow down the issues relating to remedy.
3. The parties agreed the amount of unlawfully-deducted wages in the sum of £17,027.53.

4. It was also agreed that the tribunal should make a basic award for unfair dismissal in the sum of £978.00.
5. When it came to assessing the compensatory award, the parties agreed that the claimant should recover the sum of £500.00 as compensation for loss of statutory protection.
6. The only disputed heads of compensation were:
   6.1. Compensation for the cost of the spousal visa, claimed at £2,258.00;
   6.2. Compensation for past loss of earnings; and
   6.3. Compensation for the cost of two examinations, claimed at £310.00 and £130.00.
7. In relation to the spousal visa, the specific issues were:
   7.1. Was the cost of the spousal visa incurred in consequence of the constructive dismissal?
   7.2. Had the claimant failed to mitigate her loss by failing to apply for a spousal visa earlier?
8. The respondent invited us to consider the examination fees at the same time as loss of earnings, as the underlying issues were the same. It was agreed that, during the period July to October 2017, the claimant had suffered a loss of earnings of £4,309.43. The respondent contended, however, that we should not make an award of compensation for this period, because the claimant had not made sufficient efforts to find alternative work. Likewise, for the period from October 2017 onwards, there was no dispute about what the claimant would have earned had she been employed by the respondent, and no dispute about what she actually earned from alternative sources. Where the parties disagreed was on the question of whether the claimant had properly mitigated her loss.
9. The questions for us to answer were as follows. Had the claimant failed to mitigate her loss by:
   9.1. Changing careers instead of applying for roles within the care sector?
   9.2. Carrying out unpaid work in the Philippines?
   9.3. Sitting the examinations?

Evidence

10. We heard oral evidence from the claimant, who confirmed the truth of her written remedy statement and answered questions. We also considered documents in an agreed remedy bundle. Where necessary we reminded ourselves of documents in the original hearing bundle.
11. The remedy bundle contained a supplemental statement from Mrs McManus. When the time came to call her, the respondent's representative indicated that he was not seeking to rely on the evidence in that statement.

Facts

12. As recorded in paragraphs 65 and 66 of the liability reasons, the claimant applied for a spousal visa in mid-June 2017. She took this step once it had become clear that the respondent would not sponsor her. Prior to that there was a period of uncertainty in 2017 during which the claimant had been asking Mrs McManus

about sponsorship, but only receiving vague assurances. During that time the claimant did not apply for a spousal visa. This was partly because she was waiting to acquire the necessary evidence of her partner's earnings. Her partner had recently started in practice as a barrister and needed time to demonstrate that his self-employed earnings were consistently at the required level.

13. Because of the limited time the claimant had left until the expiry of her existing visa, she paid for the visa application to be fast-tracked. Had she applied using the normal procedure she would have had to wait approximately 8 weeks for her application to be processed. Although the liability reasons state that the cost was £2,000.00, we are satisfied that the true cost was £2,158.00. She paid a supplement of £100.00 for a weekend appointment, because this was the only appointment she could attend with her partner before her visa expired.

14. Between July 2017 and October 2017 the claimant was living in the Manchester area. She worked as a Band 2 Nursing Assistant with NHS Professionals. If there were hours available in the Manchester area, the claimant would work them. She did not do any other paid work.

15. Meanwhile, the claimant searched for roles in care homes in the local area. She looked for Trainee Manager and similar roles offering pay in the region of £11 per hour. (This was the amount that we have found the claimant was entitled to be paid whilst working for the respondent.) She was informed that there were no suitable vacancies. She did not apply for any Senior Carer roles.

16. In about October 2017, the claimant was given some advice to develop her career as a nurse. She telephoned the Nursing and Midwifery Council. They informed her that she would need 6 months' more experience working as a registered nurse. She was also told by the NMC that she would need to pass the Occupational English Test and Computer-based Test and OSCE examinations.

17. The claimant contacted a number of NHS trusts and enquired if they would accept applicants who did not have 12 months of experience. She was informed that this was not possible.

18. In order to obtain the additional 6 months' experience that she needed, the claimant decided to return to the Philippines and work there. She worked in Southern Isabela General Hospital from 17 October 2017 until 17 April 2018 as an unpaid volunteer staff nurse. After about 3 months of starting, the claimant was offered a paid position in a private hospital, but declined the offer. Her reason for turning down the paid work was that she was worried that it would interrupt her 6 months' experience. She thought that there might be a gap whilst she went through pre-employment induction. She wanted to return to the United Kingdom as soon as possible.

19. We do not know what the claimant's salary would have been at the private hospital. Using our general knowledge of health sector salaries in the Philippines compared to the United Kingdom we would have been very surprised if it had been equivalent to the salaries available in the United Kingdom. The respondent has not put forward any evidence of what salary a nurse could command in the Philippines.

20. Between October 2017 and 18 April 2018, the claimant lost earnings of £9,475.17. That sum is the difference between what she would have earned

whilst working for the respondent and what she actually earned during the same period.

21. When the claimant arrived back in the United Kingdom, she sat and passed her Occupational English Test and Computer-based Test. The examination fees were £310.00 and £130.00 respectively. Once equipped with these qualifications and her 12 months' nursing experience, all she needed to do was to pass her OSCE examination and she would then be able to obtain NMC registration and work as a Band 4 or Band 5 nurse.

22. After a number of applications and interviews, she was offered a position in the University Hospital of Southampton at the end of April 2019. The claimant did not accept the offer, because her partner, a barrister in independent practice, would have found it difficult to relocate to the south coast. Eventually, following an interview on 17 July 2019, the claimant secured a place on the Band 4 Overseas Nurse Programme at Manchester Hospitals NHS Foundation Trust.

23. On 13 August 2019, the Trust sent the claimant an offer letter stating that her starting salary would be £21,089 to £23,761 and that her hours of work would be 37.5 hours per week. The following day the claimant signed her acceptance of the Trust's Terms and Conditions of Employment. Paragraphs 10 and 11 provided for additional payments to be made for on-call and unsociable hours work in accordance with Agenda for Change provisions.

24. It is within our general knowledge that nurses employed within the NHS are entitled to membership of a defined-benefit pension scheme. They also have the benefit of sick pay provisions that are, in general, more generous than those in the care sector.

25. The claimant's start date was delayed owing to one of the OSCE educators being on holiday and she started doing paid work on 9 September 2019.

26. Nurses' salaries within the NHS are determined by the NHS Terms and Conditions of Service. Each pay band has a number of spinal points. Progression along the spine depends on the length of the nurse's experience. According to the Terms and Conditions for 2018:

    26.1. The basic salary in the year 2019-2020 a for Band 4 nurse with 1-2 years' experience is £21,089.

    26.2. The basic salary in that year for a Band 5 nurse with the same experience is £24,214.

    26.3. The basic salary in the year 2020-2021 for a Band 5 nurse with 1-2 years' experience will be £24,907.

    26.4. The basic salary in that year for a Band 5 nurse with 2-3 years' experience will be £26,970.

    26.5. The basic salary in that year for a Band 6 nurse with 2-3 years' experience will be £31,365.

27. At the time of the remedy hearing, the claimant was expecting to sit her OSCE examination on 13 January 2020. She expected that within about 6 months she would be working at Band 5. She also expected that the Trust would support her progression to Band 6, which would involve taking a foundation course. Her line manager was positive about the claimant's prospects. She predicted that she

would be working at Band 6 within about a year. At Band 6, her earnings would substantially exceed that which she would have earned had she continued to be be employed by the respondent.

28. We find as a fact, taking into account our own experience and the claimant's own evidence, that there were Senior Carer roles available in the local area. They would have paid between £8.00 and £9.00 per hour.

29. We do not have any evidence about the claimant's prospects of career progression had she remained working within the care sector. There was no evidence of abundant Manager or Trainee Manager jobs, which makes us think that it would have been a relatively difficult thing to do to progress quickly up the career ladder within a care home. Whilst we found that respondent's organisation had a considerable number of people purporting to be managers of one sort or another, we have to be careful about extrapolating that finding into other care home providers. At the time of the 2015 inspection, at least four of the respondent's trainee managers were not really trainee managers at all: they were being paid as Senior Carers.

Relevant law

30. Section 123 of the Employment Rights Act 1996 provides, so far as is relevant:

> (1) Subject to the provisions of this section … 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) …loss of any benefit which he might reasonably be expected to have had but for the 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…

31. It is for the employer to prove:

31.1. that the employee has unreasonably failed to mitigate her loss; and

31.2. that, had the employee taken reasonable steps to mitigate her loss, her loss would have been smaller.

32. The duty to mitigate does not arise until the employee has been dismissed: *McAndrew v. Prestwick Circuits Limited* [1988] IRLR 514.

33. In *Whelan v. Richardson* [1998] ICR 318, the EAT laid down a series of propositions to be applied when assessing an employee's loss. These include:

33.1. The assessment of loss must be judged on the basis of the facts as they appear at the date of the remedies hearing.

33.2. If, at the date of the remedies hearing, the employee has found alternative permanent employment which pays at least as much as the job from which he or she was dismissed, then the tribunal should only assess the employee's loss from the date of dismissal to the date on which he or she started the new job. The dismissing employer cannot rely on the employee's increased earnings to reduce the loss sustained prior to taking the new employment.

34. During the course of the parties' submissions, the employment judge posed this question: Assume that the tribunal were to find that the claimant would, shortly after the remedy hearing, obtain employment with remuneration substantially in excess of that which she been entitled to receive had remained employed by the respondent. The tribunal should not reduce the amount of the compensatory award by her expected future gain in earnings. But the tribunal can reflect the expected future gain by shortening the period of her past loss of earnings. Is this the correct analysis? Both parties' representatives confirmed that it was.

Conclusions

Spousal visa

35. We allow the £2,258.00 cost of the spousal visa and weekend supplement in full. The expense was incurred in consequence of the constructive dismissal and was attributable to the actions of the respondent. The tribunal has already found that, had the claimant not been constructively dismissed, she would have carried on working for the respondent. The fundamental breach of contract consisted of a failure to support the claimant's Tier 2 visa application (liability reasons paragraph 148). Had the respondent not fundamentally breached the contract in this way, the claimant would have been sponsored (liability reasons, paragraph 157). The claimant would not have needed to apply for a spousal visa.

36. The respondent argues that the claimant, in the run-up to July 2017, ought to have realised that it could not have been certain that she would have been given a Tier 2 visa and therefore ought to have applied for a spousal visa at an earlier stage. It is the respondent's case that the claimant's failure to take this step was an unreasonable failure to mitigate her losses.

37. We disagree. This is an argument that the claimant should have mitigated her loss prior to dismissal, which there was no obligation on her to do. If we are wrong, and there is a requirement to mitigate loss prior to dismissal, we would still reject the respondent's argument. We do not think the claimant acted unreasonably by waiting until mid-June 2017 before applying for a spousal visa. She was being given vague reassurances that she would get a Tier 2 visa supported by the respondent. Her partner was a barrister starting in practice and they needed time to demonstrate that he was achieving the required level of earnings. It was no mean undertaking to apply for a spousal visa and to incur the cost or the paperwork; the later they left it the more evidence they would have had that her partner was achieving the required level of earnings.

Loss of earnings from July to October 2017

38. In our view the claimant did not act unreasonably during the period July to October 2017. She worked as a healthcare assistant when she could. She looked for work in the care sector. It was reasonable, for a few months, to confine her search to roles that would pay as much as she had been entitled to

be paid whilst working for the respondent. We therefore award the claimant her full loss of earnings in respect of this period. The award for this period is £4,309.43.

Loss of earnings from October 2017 to April 2018

Mitigation – change of career

39. There might have come a time after October 2017 when it ceased to be reasonable for her to take that position. It would have become reasonable to expect her to apply for lesser paid roles which she was well capable of doing. We would have expected her to take that course if she had not had the alternative option of changing careers. As it was, she did have that option. What we have to decide is whether it was unreasonable for her to take the decision to register as a nurse.

40. In our view it was not unreasonable for the claimant to take steps to register as a nurse. The decision meant that, for a while, her loss of earnings would be greater than it would be if she immediately started looking for work as a Senior Carer. But a change of career carried a much better prospect of eventually eliminating her loss of earnings altogether. By 9 September 2019, the claimant's basic salary was already well in excess of what she could expect to earn as a Senior Carer. It was very near to the claimant's basic salary with the respondent of £21,700. The respondent argues that the claimant's actual pay from the respondent was in excess of this figure. But that argument ignores that, whilst employed by the respondent, the claimant worked overtime. The claimant's basic salary as a Band 4 nurse was based on a 37.5 hour week. If the claimant wished to work overtime for the Trust, her pay would increase. Enrolling as an NHS nurse also attracted pension and sick pay benefits that she would be unlikely to obtain in the care sector.

41. The alternative option of looking for work as a Senior Carer would have confined her to a long-term shortfall in her earnings compared to what she had been entitled to be paid by the respondent. It is argued by the respondent that the claimant should have chosen that option. According to the respondent, the claimant should have realised that, if she sought work as a Senior Carer, she would have the opportunity to progress to a management role and eliminate her loss of earnings. We do not accept that argument for two reasons. First, the respondent has not proved that the claimant would have progressed to a higher-paid role if she had started work as a Senior Carer. We take into account the lack of reliable evidence of opportunities for internal promotion within care homes. We also bear in mind that the claimant would have had to confine her search to a relatively limited geographical area because of her partner's difficulties in relocating. Second, even if the respondent is correct about upward mobility in the care sector, that does not mean that the claimant acted unreasonably in not seeking it. The claimant was not aware of any opportunities that Senior Carers had for promotion. By constructively dismissing the claimant, the respondent gave the claimant a difficult choice to make. She was confronted with two options, both with their own advantages and disadvantages. Even if, with hindsight, one option might be said to be preferable to the other, that does not mean that the claimant's choice of the other option was unreasonable.

Mitigation – unpaid work

42. The respondent advances an alternative submission. If it was reasonable for the claimant to change her career, she should at least have tried to do it in a way that kept her loss of earnings to a minimum. So, if offered the choice between unpaid work experience and paid work experience, it would be unreasonable of her to choose the former over the latter. We agree with the respondent that the claimant would need a good reason for choosing to volunteer, rather than accept paid work. We are satisfied, however, that the claimant had a good reason for rejecting the private hospital post in the Philippines. She was worried about interrupting the continuity of her work experience whilst background checks were being done. Her decision was not an unreasonable one.

Award for loss of earnings during the period

43. The claimant is therefore awarded her full loss of earnings for this period in the sum of £9,475.17.

Loss of earnings from 18 April 2018

44. Central to our conclusion on mitigation of loss is our finding that the claimant's ongoing financial position is better than it would have been had she remained employed by the respondent. In our view it would be just and equitable to require the claimant to give some credit for that fact. We must not deduct the ongoing surplus from past losses. What we can do, however, is fix the cut-off date for financial losses at an earlier point than we otherwise would have done. Put another way, we shorten the period of attributable loss to reflect the benefit that the claimant has indirectly obtained by being constructively dismissed. In our view, a fair cut-off date would be 18 April 2019. This allows for a further 12 months' loss of earnings but no more.

45. During the 12 months from 18 April 2018 to 18 April 2019, the claimant would have earned £23,559.64 if she had remained in the respondents' employment.

46. From that sum must be deducted all the income that the claimant actually received in her new employment. We calculated that income to be £18,329.74. Here is how we arrived at that figure:

    46.1. There was no dispute that the claimant had received £22,799.26 for the period of 73 weeks from 18 April 2018.

    46.2. Using the claimant's payslips, we calculated that, from 18 April 2019 to the end of the 73-week period, the claimant earned £4,469.52.

    46.3. The correct amount of income for the remaining 52 weeks is reached by subtracting £4,469.52 from £22,799.26. This gives a figure of £18,329.74.

47. The claimant's loss for the period is therefore £23,559.64 minus £18,329.74, which equals £5,229.90.

48. When announcing our judgment, the employment judge invited the parties to double-check the calculation if they wished to do so.

Examination fees

49. We turn to the fees for the Computer-based Test and the Occupational English Test. The respondent helpfully acknowledged that the recoverability of these fees would stand or fall with the arguments over the reasonableness of the claimant's career change. Since we have determined those arguments in the

claimant's favour, it follows that we award the fees in full. The award under this heading is £440.00.

Total compensatory award

50. Pulling the different elements together, the compensatory award is calculated as follows:

	£
Loss of statutory protection	500.00
Spousal visa	2,258.00
Lost earnings July to October 2017	4,309.43
Lost earnings October 2017 to April 2018	9,475.17
Lost earnings April 2018 to April 2019	5,229.90
Examination fees	440.00
Total	22,212.50

Employment Judge Horne
26 February 2020

REASONS SENT TO THE PARTIES ON

25 March 2020

FOR THE TRIBUNAL OFFICE