EMPLOYMENT TRIBUNALS

Claimant Miss E Dines

Respondent: Otto Coffee and Wine Bar Limited

REMEDY JUDGMENT

The claimant is awarded damages and compensation as set out below:-

1. Damages for wrongful dismissal (giving credit for earnings from new job in last two weeks of the notice period) - £716.
2. A basic award in respect of unfair dismissal, taking into account 50% contribution, £399.
3. As a compensatory award for unfair dismissal –
   3.1. Immediate loss of earnings for the period 28 June 2019 to 31 December 2019, a period of 27 weeks at a differential loss of £34.95 per week £943.65, less 50% contribution, reducing the award to £471.82.
   3.2. Loss of statutory rights £300, but reduced by 50% for contribution so the award is £150.
4. By consent in respect of holiday pay the claimant is awarded the sum of £35 for accrued but untaken holiday at the date of dismissal.
5. The Recoupment Regulations do not apply.

   Accordingly, the total award for compensation and damages is £1771.82. That sum is payable by the respondent to the claimant forthwith.

REASONS

1. The liability Judgment was delivered at the conclusion of a one-day hearing on 20 December 2019. The complaints of unfair dismissal and wrongful dismissal succeeded although I found that the claimant had contributed to her unfair dismissal to the extent of 50%.

2. Towards the end of the hearing on 20 December 2019 some evidence in respect of remedy was taken and it had been my intention to deal with remedy that day as well. Unfortunately, not all the necessary information or documents were to hand. In those circumstances I made a case management order requiring both parties to provide the missing information. The compliance date was set as 13 January 2020. The respondent provided the information which had been required of it. However, the claimant only partially complied. She failed to indicate when her new employment with Victoria Homecare Limited had commenced and she had failed to set out her case in respect of holiday pay entitlement. The information about holiday pay from both parties at the 20 December hearing had been so inadequate that it had not been possible for me to give a Judgment even on liability for that aspect of the claim. The claimant had however in her email of 14 January 2020 made the somewhat enigmatic comment "please remedy as required. I am happy with the unfair dismissal. The amount is a bonus". I did not understand what the claimant meant by this. Was she agreeing with the respondent's calculation of holiday pay or was she abandoning that part of the claim?

3. In those circumstances I caused a letter to be written to the claimant seeking further clarification. The claimant failed to reply to that letter or to a subsequent reminder. In those circumstances I directed that the remedy issue be listed for a three-hour hearing so that the missing information could be obtained and Judgment given on remedy as appropriate.

4. The date set for that hearing was 3 April 2020. Unfortunately, that hearing had to be converted to a telephone case management hearing in circumstances where the Tribunal was no longer able to conduct face to face hearings by reason of the Covid-19 pandemic.

5. The converted case management hearing by telephone on 3 April 2020 was therefore used by me as an opportunity to obtain the missing information from the claimant. In particular the claimant was able to confirm that her new employment with Victoria Homecare Limited had commenced on 17 June 2019. The claimant had previously provided copy payslips for this new employment for the months July, August, September and November 2019. At the 3 April hearing I asked the claimant to provide her payslip for December 2019 which, as it turned out was the last payment she received from that employment. The claimant told me that she had begun a new job at a bar in January 2020. I also asked the claimant to provide a copy of any payslips she had for this new employment. Unfortunately, the claimant has failed to provide this additional documentation within the time stipulated. Having regard to the now drawn out nature of this matter I have taken the view that finality and certainty is required and so I have made my calculations on the basis of the information I had.

6. At the 3 April hearing the claimant confirmed that she accepted the respondent's calculation of outstanding holiday pay which was in the amount of £35 and so I have entered Judgment in that amount.

7. The award of damages for wrongful dismissal – in circumstances where the claimant had not committed gross misconduct but was nevertheless dismissed summarily – the 50% contribution does not apply. However, at the 3 April hearing Mrs Atkinson the respondent's business manager suggested I should make a deduction to take into account that the claimant had obtained new employment during the notice period. On the basis that damages for breach of contract should reflect the actual loss and not include any payment which could be regarded as a windfall, I considered that there should be credit given for the earnings in the latter part of the notice period. The notice entitlement is agreed to be one month and so the notice period extends from the date of termination, 28 May 2019, to 28 June 2019. As the claimant obtained new employment on 17 June 2019 I have deducted the sum of £288 representing the two weeks' pay from the new employment received during the latter two weeks of the notice period. The claimant's net weekly pay has been agreed at £323 and accordingly the four-week entitlement would have been £1292, but deducting the £576 which the claimant received for her work with the new employer leaves a balance of £716.

8. The basic award for unfair dismissal has been calculated on the usual statutory basis. At the material time, that is to say the date of dismissal, the claimant was aged 33 and she had two complete years' service. On the basis of the payslip for period 12 in the old employment which the claimant has provided me with I calculate that her gross weekly pay was £399. The appropriate multiplier is 2 which would lead to a basic award calculation of £798. However, the 50% contribution must be deducted and so the basic award is reduced to £399.

9. In terms of the compensatory award for unfair dismissal for loss of earnings, the period of loss begins at the end of the notional notice period. That is to say from 28 June 2019. Doing the best, I can with the payslips that are available to me, I have calculated that the claimant's average weekly pay from the new employment with Victoria Homecare Limited was £288.05. The claimant, if not dismissed, would have been earning £323 net per week and so the differential is £34.95. I consider that the cessation of the first new employment, apparently at the end of 2019 is sufficient to break the chain of causation. This means that the respondent should not be liable to compensate the claimant for any loss of earnings after the end of the first new employment. I take the view that the first new employment was of sufficient duration to mean that loss subsequent to termination of the first new employment is too remote. Whilst I took information from the claimant as to her second new job, the bar work, the claimant has not provided any payslips for this although I estimate that her new earnings would have been approximately £20 less per week than they were with Victoria Homecare Limited.

10. Although it was not a point raised by the claimant, the likelihood (unless she has been furloughed) that she is not receiving any pay for the second new job – because the bar at which she worked would obviously have been closed during the so-called lockdown period, is of course not a loss which flows from her unfair dismissal. The sum awarded for loss of earnings has therefore been calculated at 27 weeks at the differential rate of £34.95, which gives £943.65, but after the 50% contribution reduction leaves £471.82.

11. I have made an award to the claimant for compensation for loss of statutory rights. In the employment with the respondent the claimant had been employed for

sufficiently long to have acquired those statutory rights that accrue after two complete years' service – including, importantly, the right not to be unfairly dismissed. In any new employment the claimant will therefore have lost those rights until she has accrued two years' service with that employer. The Tribunal usually awards a nominal amount to compensate for this loss and I considered that the sum of £300 was appropriate, although again this must be reduced for the contribution and so becomes £150.

12. Towards the end of the 3 April hearing Mrs Atkinson pointed out that the respondent's business was closed during the lockdown period and she anticipated that there might therefore be difficulty in making the payment to the claimant in due course. She enquired whether I could make an order for the monies to be paid in instalments. I explained that this would only be possible if the parties were able to agree instalment payments and that option remains open to the parties now they know what sums are due. I went on to explain that normally a Judgment would be expressed in terms that it was to be paid immediately. It would be open to the respondent – if the claimant found it necessary to take enforcement proceedings via the County Court - to apply to the County Court for an instalment order.

13. I have explained to the claimant the steps which are open to her if, having allowed say 14 days from the receipt of this Judgment, she fails to receive payment from the respondent.

Employment Judge Little

Date: 20th April 2020

JUDGMENT SENT TO THE PARTIES ON

Date: 20th April 2020