EMPLOYMENT TRIBUNALS
Telephone Hearing

Claimant: Mrs Stella Hanson

Respondent: Secretary of State for Justice

HELD AT: Leeds **ON:** 16 June 2020

BEFORE: Employment Judge T R Smith

REPRESENTATION:

Claimant: Mr Penman (Counsel)
Respondent: Ms Mellor (Counsel)

JUDGMENT

1. The Respondent is ordered to pay the Claimant £46,713.24 by way of compensation for unfair dismissal (Basic award £14,447 + capped compensatory award of £32,266.24).
2. The Employment Protection (Recoupment of Jobseekers and Income Support) Regulations 1996 SI 1996/2349 do not apply.

REASONS

Issues.

1. Today the Claimant confirmed she did not seek reinstatement or re-engagement but pursued compensation as her remedy.
2. The Claimant sought an uplift pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. Before the Tribunal the Respondent now disputed whether the section was engaged.
3. The Respondent contested the Claimant's evidence as to her compensatory award, and in particular whether there had been a failure to mitigate her loss, and the length of any loss.

Documents and evidence.

4. There was an agreed bundle of documents totalling 96 pages.
5. The Claimant relied upon her two statements, the first undated and the second dated 07 May 2020.
6. The Tribunal heard oral evidence from the Claimant.
7. No evidence was called on behalf the Respondent. The Respondent relied upon the documentation in the Claimant's bundle and cross examination of the Claimant.
8. A reference to "ERA96" means, in this judgement The Employment Rights Act 1996.
9. A reference to "Section 207A" means , in this judgement section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Background

10. The Claimant presented a complaint to the Tribunal of constructive unfair dismissal. The complaint was heard on the 12 and 13 March 2020 and a reserved decision (the "liability judgement") was sent to the parties on 24 March 2020.
11. The Tribunal incorporates its findings of fact from the liability judgement into this judgement even if not specifically referred too.

Agreed Facts.

12. The Claimant was born on 12 August 1958.
13. The Claimant commenced employment with the Respondent on 07 February 2000.
14. The Claimant resigned on the 24 November 2018 with an agreed termination date of 31 March 2019.
15. The Claimant was aged 60 as at the effective date of termination ("EDT") with 19 complete years continuous service as at the EDT.

16. As at termination the Claimant's gross annual pay was £32,266.24 pa. It was agreed this was the statutory cap applicable to any compensatory award the Tribunal might make.
17. Her gross weekly pay was £620.50 and net weekly pay was £481.28.
18. The cap on a week's pay as at the EDT was £508pw.
19. The parties had agreed that the basic award amounted to £14988.00 but, on questioning from the Tribunal, agreed this figure was wrong. Counsel agreed that the correct figure was £14,447.
20. Loss of statutory rights was agreed at £500.
21. The job of the Claimant with the Respondent was to assist in the collection of prison intelligence.
22. The Claimant was a member of the Respondents "classic" pension scheme. Both counsel had agreed that for the purpose of this hearing the "simple" method would be utilised in calculating any pension losses, that is utilising the Respondents pension contribution percentage. The Respondent's contribution was 20.9%.
23. It was agreed that had the Claimant remained in employment she would not have been furloughed by the Respondent during the current Covid-19 outbreak.

<u>Additional findings of Fact.</u>

24. The Claimant left school at 15 with CSE qualifications .
25. She was in regular work, firstly as a pharmacy assistant and then undertaking sales and bar work, until her children were born .
26. Thereafter she worked in an administrative role in a garage, as a security operative, she drove a mobile surgery for the Blood Transfusion Service and then worked as a bus driver .
27. The Claimant holds a current driving licence and has held HGV and PSV licences, although the latter two have lapsed. The Tribunal found as a fact that if the Claimant wished to renew such licences, she should need to retake the appropriate tests and examinations.
28. The Claimant worked in the Magistrate's Court as a warrant officer before finally joining the prison service.
29. The Tribunal concluded the Claimant was a hard-working person who had not avoided work in the past and showed herself to be capable and adaptable in undertaking a variety of roles.
30. The Claimant generally has enjoyed good health, although suffered what she described as stress and depression as a result of her treatment by the Respondent. She accepted that although she was currently still on antidepressant medication she is fit to work.
31. The Claimant did not start attending the Job Centre until July 2019 although her EDT was 31 March 2019.
32. The Claimant did not start applying for work until late July 2019.

33. She applied for a role with the National Crime Agency on 28 July 2019 and was informed she was unsuccessful in September.
34. She applied for a job on 29 July 2019 with the NHS as a social prescribing link worker. She was informed in October she was unsuccessful.
35. She also applied for a further job in July 2019 as a security assistant and was informed in November 2019 that she was unsuccessful.
36. The Claimant applied for a role as an aviation security training instructor and was interviewed on 09 August 2019, but was unsuccessful.
37. In October 2019 the Claimant applied for the post of a clinic manager and was unsuccessful.
38. Between July and November 2019, the Claimant registered with three recruitment agencies.
39. The Claimant ceased her job search at the end of November 2019 when she learned her father had been diagnosed with terminal cancer.
40. She cared for her father until his death on 16 January 2020.
41. The Claimant has since been caring for her mother, who receives the highest rate of attendance allowance. Her mother has mobility and other physical problems, including the effects of a stroke, and is in sheltered accommodation. Her health is such she has to carry an alarm round her neck. The Claimant visits her mother morning and night to check she has taken her medication and undertakes general tasks for her including shopping. The Tribunal concluded the Claimant underplayed her role in her mother's care.
42. After her father's death the Claimant applied for the post of fitness professional and was offered an unpaid internship for eight weeks, to allow her to obtain the appropriate qualifications. She was then told she could be offered four hours work per week at a rate of £12 per hour, and after six months would be free to recruit new clients to supplement her income.
43. As it transpired, due to the outbreak of Covid -19 the Claimant has never obtained her qualification and is not aware as to when the gym will open, but is hopeful there may be prospects of opening in the next month or two.
44. The Claimant has not applied for any other employment since the death of her father.
45. The Claimant accepted that she is fit and able to work.
46. The Claimant's husband works 19 hours per week as a prison officer. He has work part time since approximately 2016.
47. The Claimant has not received any recoupable benefits to which the Recoupment Regulations would apply

Submissions.

Ms Mellor

48. Ms Mellor submitted that, given the recent events in the Claimant's life, the Tribunal could not be sure that the Claimant would work full-time until the age

of 65. She submitted the compensatory award should be adjusted in two distinct parts.

49. Firstly, linked to a failure to mitigate, there should be no award between the EDT and the end of July, when the Claimant started to look for work.

50. Secondly there should be no award after November 2019 when it was more likely than not, the Claimant would have given up work completely due to her father's condition and thereafter to look after her mother. In the alternative the Tribunal was entitled to conclude, she submitted, from November 2019 the Claimant's hours would have been reduced had she not been unfairly dismissed.

51. She contended that section 207A was not engaged. There was nothing to say in the Code that it applied for constructive unfair dismissal. She relied upon the comments made by Mr Justice Mittings in **Phoenix House Ltd -v- Stockman 2017 ICR84** at paragraph 21 when he said Parliament had laid down a sanction in the Trade Union and Labour Relations (Consolidation) Act 1992 s.207A for failure to comply with the Code and clear words in the Code were required to give effect to that sanction, otherwise an employer might be at risk of a punitive element of an award when he had not been clearly forewarned by Parliament and by ACAS that that would be the effect of failing to heed the Code.

52. As, she said, there was a lack of clarity as to whether the Code applied the employer should be given the benefit of the doubt.

53. If she was wrong on that matter then any adjustment, based on the Tribunal's previous findings should be in the region of 10% and no more than 15%.

Mr Penman

54. Mr Penman said the Claimant had given credible evidence why could not immediately looked for work after the EDT.

55. The Tribunal had previously found that it is likely the Claimant would have worked until the age of 65.

56. There should be no deduction for mitigation as the Respondent had not discharged the burden of proof on it and the Claimant was a reliable witness.

57. The Claimant had applied for other roles and there was no evidence before the Tribunal of other roles that were available which she could have applied for, but did not.

58. It was not unreasonable for her to suspend the job search between November 2019 February 2020 nor was it her fault that she could not start her part-time role at a local gym due to the COVI-19 shutdown.

59. Turning to the section 207A point, unfair dismissal, which included a constructive unfair dismissal was potentially engaged. Whilst he accepted there was no mention made of a constructive unfair dismissal in the statutory code this was a case where there had been clear breaches as found by the Tribunal and it would be unjust not to make an award.

60. Those breaches were so serious and so numerous that a 25% uplift was appropriate, or if not, at least 20%.

61. Mr Penman also referred to **Base Childrensware Ltd-v- Otshudi 2019 EAT 0267/18.**

Discussion.

The Basic Award

62. There was no dispute that a Basic Award should be made or that, even if section 207A was in play, that there should be any statutory uplift in respect of the Basic Award.

63. The Tribunal calculated the Basic Award, applying section 119 ERA96 and concluded, with the agreement of the parties ,that the Basic Award amounted to £14478 (19 years complete service, gross pay limited to £508 and with a multiplier of 28.5 allowing for the Claimant's age).

The Compensatory Award

General principles

64. Turning to the compensatory award the Tribunal reminded itself it must consider whether it is appropriate to make an award at all. The objective of a compensatory award was to compensate the Claimant but not to award a bonus.

65. Section 123 ERA96 provides that the award shall be: –

66. *"Subject to the provisions of this section and section 124, 124A and 126, the amount of the compensatory award shall be such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"*

67. Section 123(4) ERA96 reads: –

68. *"in ascertaining the loss referred to in subsection (i) the Tribunal shall apply the same rule concerning a duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…"*

69. When considering heads of loss, the Tribunal reminded itself it was essential not to lose sight of the key factors identified by Parliament, firstly the loss must be as a consequence of the dismissal, secondly attributable to the Respondent and thirdly it must be just and equitable to make an award.

70. The compensatory award is subject to a statutory cap which is the lower of 52 weeks' pay for the employee at the time of the dismissal or to the sum set out under the Unfair Dismissal (Variation of the limit compensatory award) Order 2013/1949 as varied from time to time.

Discussion

71. The Tribunal is satisfied that in calculating the compensatory award, time should run from 01 April 2019 and not from July 2019 as submitted by Ms Mellor.

72. The Tribunal came to this conclusion because the Claimant provided a reasonable explanation, that she was still signed off by her GP as unfit for work. Had the Claimant not been constructively unfairly dismissed she would have remained on full pay, see paragraph 138 of the liability judgement, even whilst

absent due to ill-health. It was not unreasonable for the Claimant to want to fully recover her health before seeking alternative employment. No evidence was before the Tribunal to contradict the Claimant's assertion that her ill health was, at least in part, the result of the way she had been treated.

73. Further ill health, at the date of dismissal, does not necessarily break the chain of causation. That said the Tribunal reminded itself whilst an employee cannot expect that, even with an illness caused by the employer that renders that person unfit for work, to recover for the entire period of incapacity, it was for the Tribunal to determine whether recover was just and equitable in all the circumstances, see **Devine v Designer Flowers Wholesale Florists Sundries Limited [1993] IRLR 517 EAT**. The evidence pointed to the fact the Claimant's heath was related to the way she was treated. The period between 31 March and July was not excessive. She would have remained on full pay had she not been constructively dismissed. Pulling all these factors together lead the Tribunal to conclude that it was just and equitable for the Claimant to recover from the start of April until July.

74. From July 2019 until November 2019 the Claimant took reasonable steps to secure alternative employment. The Respondent has not produced any evidence of other suitable jobs that were available to the Claimant for which she did not apply. The Tribunal concluded the Claimant should recover a full loss of earnings in this period.

75. However, where evidence existed, the Tribunal observed that at least one of the jobs the Claimant applied for was part-time (see for example page 57 of the bundle). It was a curious omission that the job descriptions for those posts applied for were not included in the bundle, which would have thrown light on whether the other applications were full or part time. It is surprising this was not a matter pursued by those instructing Ms Mellor at an early stage.

76. At the liability hearing the Tribunal made a number of findings of fact in respect of the submission made by Ms Mellor on the **Polkey – A. E. Dayton Service Ltd** point. Those finding was based on whether there was a risk that the Claimant would have been dismissed fairly for incapability caused by ill health. For the reasons set out in the liability judgement the Tribunal held against Ms Mellor on that point. The Tribunal further found that the Claimant was likely to reduce her hours by 20% when she reached the age of 61.

77. The Tribunal accepted that Ms Mellor was now entitled to revisit these findings, given the new facts that had come to light that were not known at the liability hearing, as to how the Claimant's life had changed following the death of her father and the need to care for her mother. Ms Mellor was entitled to rely upon this further information to support her submission that the Tribunal should reconsider its assessment of whether the Claimant would have left work before 65 and if she did not, to what extent she would have reduced her hours. Mr Penman, very fairly, raised no objections

78. The Tribunal concluded that had the Claimant not been unfairly dismissed the Claimant would have taken time off work to look after her father. No evidence was placed before the Tribunal of what policies the Respondent had in respect of such situations as to remuneration. All the Tribunal can determine is the Claimant would not have voluntarily left her employment simply due to the

father's terminal illness. She would have remained in work. She might have been entitled to some form of paid leave of absence, especially given the size of the Respondent, but without evidence from the Respondent the Tribunal cannot conclude, even if she was not dismissed, she would have no pay or restricted pay.

79. The position as to whether the Claimant would have reduced her hours when she became her mother's carer is one the Tribunal considers it can examine as it did have some evidence to reach a conclusion. The Claimant is the principal carer of her mother. The Tribunal have concluded it is more likely than not the Claimant would have gone part-time had she not been unfairly dismissed in her employment with the Respondent. The Tribunal reached this conclusion for the following reasons

80. The Tribunal knew the Claimant had applied previously to reduce her hours, although that had been rejected by the Respondent. That however was a reduction in the particular job she was doing. There was no suggestion the Respondent would not consider an application to reduce hours generally. Indeed, an employee has a statutory right to apply for flexible working. The Tribunal is entitled to take into account the Claimant was seeking part time work with the Respondent before any of her family challenges.

81. Further there would be great difficulties in combining caring duties with a full-time job.

82. Also relevant is the fact the Claimant's husband, a prison officer was working part-time and it would be natural that the Claimant would want to spend a little more time with him.

83. Finally, and significantly from July 2019 the fact the Claimant had certainly looked at least two part time jobs (as identified above and the Claimant made enquiries about the gym post, see below initially in October 2019) even before she knew her father was sadly dying and she would become her mother's principal carer.

84. On the limited evidence the Tribunal has, and doing the best it can, the Tribunal has concluded that from March 2020 had the Claimant remained in employment she would have been working 50% of her previous full-time role. While the Tribunal noted the Claimant had previously applied for a 20% reduction given the newfound care responsibilities for her mother and the fact the Claimant was the principal carer a 50% deduction is in the Tribunal's judgement just and equitable. However, it did not find the Claimant would have given up work completely.

85. The Claimant cannot be criticised for the fact she could not start her internship at the gym and then part-time employment while she built up her role as a fitness trainer. She could not work because of Covid-19. The Respondent must take the Claimant as they find her and is not her fault she could not work. Had she not been constructively unfairly dismissed she would have received a full salary.

86. The Tribunal, applying the best information available to it, assumed that it may be possible for the Claimant to start her internship on 1 August and that after eight weeks she will obtain her qualification. She will then earn £48pw for the

first six months. No evidence was before the Tribunal as to what she would earn thereafter but the Tribunal did not regard it as unreasonable to assume that the Claimant could build up 12 hours work per week which would result in an income of £144pw. The Tribunal have no evidence as to what the tax and national insurance situation would be. The Claimant will have some taxable income because of her pension, although evidence was not placed before the Tribunal as the amount of the same or of the income of her husband which will impact upon the tax situation. The Tribunal therefore took a broad-brush approach applied a 20% reduction for such tax when the Claimant worked 12 hours per week, producing a net income of £115.20 pw.

87. The Tribunal have no evidence as to what the Claimant would do as regards another pension.

88. The Respondent did not content that the Claimant ,by taking the role at the gym had failed to mitigate her loss. The Tribunal noted this was a significant career change and that she might have been able to obtain a greater income doing other work but this was not argued before it. In any event, the burden of proof on a failure to mitigate is upon the Respondent. It is not enough for a Respondent to show there were other reasonable steps the Claimant could have taken (which it did not) but must show the Claimant was unreasonable in not taking such steps. The Tribunal was not satisfied that the Respondent could demonstrate a failure to mitigate either in taking the job at the gym or at any stage from the effective date of termination. In reaching this conclusion the Tribunal was guided by the decisions in **Cooper Contracting Ltd -v-Lindsay UKEAT/184/15** and **Tandem Bars Ltd -v- Pilloni UKEAT/0050/12.**

Section 207A

89. Section 207A(2) TULR(C)A provides that:

90. *"If, in any 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) the 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 per cent."*

91. The list of proceedings (or 'jurisdictions') to which S.207A(2) and (3) applies is set out in Schedule A2 TULR(C)A and unfair dismissal is included in the list.

92. The relevant Code for unfair dismissal purposes is the revised ACAS Code of Practice on Disciplinary and Grievance Procedures.

93. The Tribunal invited Mr Penman to demonstrate either by authority or by reference to the Code that it specifically applied to a constructive unfair dismissal. Whilst he did make reference to the case of **Base Childrensware Ltd-v- Otshudi 2019 EAT 0267/18** the Tribunal concluded it was not on the point and did not assist in its deliberations.

94. The Tribunal preferred the submissions of Ms Mellor that it could not be assumed that the Code applied. She took the Tribunal to case law

demonstrated, for example, that a dismissal for some other substantial reason was not covered by the Code.

95. The Tribunal did not find Mr Penman's argument attractive that any breach of a grievance procedure would result in a breach of the Code. The Tribunal invited Mr Penman to consider the case of a redundancy dismissal which was unfair where the employee raised a grievance. Did the Code apply? He opined it would because there was a breach of the grievance procedure. The Tribunal considered this exposed the shortcoming in Mr Penman's argument, given the redundancy is expressly excluded from the Code.

96. It is for these reasons and giving the burden was on Mr Penman, that the Tribunal declined to make an uplift.

97. However, if the Tribunal was wrong on this point it then went on to consider what uplift it would have made.

98. By virtue of S.124A ERA96, it is clear that any adjustment made in accordance with S.207A applies to the compensatory award only

99. The Tribunal reminded itself the failure to comply with the Code must be unreasonable and not every failure to follow the Code necessary resulted in an automatic adjustment.

100. In assessing any uplift, the Tribunal considered that the extent of the Respondent failed to follow its procedures, the size and resources of the Respondent, whether that failure was deliberate or inadvertent and whether there are any circumstances which would mitigate the blameworthiness of those failures all to be relevant factors.

101. A 25% uplift was for the very worst case. Here whilst it is true the Respondent ignored the Claimant's first grievance that was remedied by the second grievance hearing. The third grievance was not ignored and the Claimant received a response in writing but failed to hold a meeting or to advise of her right of representation. The Tribunal concluded the reason the Claimant received a response in writing to the third grievance, rather than a meeting, was there was nothing further that the Respondent was able to say. The Tribunal accepted that the Respondent was trying to resolve matters but was dependent upon an outside contractor ,although could have done more itself to expedite matters.

102. If the Tribunal is wrong in its primary conclusion as regards section 207A it determined that looking at all these matters in the round it preferred the submissions of Ms Mellor and a 10% uplift was appropriate.

103. In any event, even if there should be a 10% uplift the point is irrelevant given the statutory cap.

Mathematical summary

Basic award

£14478

Compensatory award

Past loss

Loss from EDT to 1/4/20

1/4/19 to 01/4/20, 52 weeks x £481.28 net = £25,026.56

Pension 52 weeks x £129.68 pw (20.4% of £32,266.24 pa divided by 52 weeks) = £ 6743.36.

Loss from 1/4/20 to Tribunal hearing 16/6/20, 10 4/5 weeks

£481.28 x 50% x 10 4/5 weeks = £2598.91

Pension loss for above period

£129.68 x 50% x 10 4/5 weeks = £700.27.

Total Past Loss

£35,069.10

Future loss

Loss of Statutory rights

£500

16/6/20 to 12 /8/2023, Claimants retirement at 65 working 50% full time role.

£481.28 x 50% x 164 2/5 weeks =£ 39,561.21.

Pension loss for same period

£129.68 x 50% x 164 2/5 weeks £10,659.69

Total future loss £50,220.90 +£500 loss of statutory rights = £50,720.90

Less earnings from 1/8/20, 8 weeks no income than 16 weeks at £48 pw then at £115.20 , 1/2/2021 £15,974.40

£50720.90 - £15974.40 = £34,746.50

Therefore, Compensatory award £35069.10 +£34,746.50 = **£69815.60**

Total £14478 (Basic Award) + £69815.60 = £84293.60

For tax purposes both the basic and compensatory award are tax-free up to £30,000 but thereafter are taxable at the appropriate rate. As the combined sum, of the basic and compensatory award is greater than £30,000, to ensure the Claimant is not disadvantaged, the Tribunal is required to gross up the excess.

Excess £54293.60

The Tribunal assumed 20% tax

£54293.60 x 100/80 = £67867.

Therefore £67867 - £30,000 (being tax free exemption)=£37,867.

104. The EAT held in **Grant London Ltd -v- Aspden UKEAT/0242/11** that the correct approach is to impose the statutory cap after the grossing calculation has been done

105. Therefore, maximum compensatory award £32,266.24

Employment Judge T R Smith

Date 30 June 2020