EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Barker	**v**	Marks and Spencer Plc

Heard at: Bury St Edmunds (by CVP) **On:** 10 August 2020

Before: Employment Judge M Warren

Member(s): Mr R White

Appearances
For the Claimant: Mrs Barker (Claimant's Mother).
For the Respondent: Mr Anderson (Counsel).

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The respondent shall pay the claimant £4,914.60 made up of a Basic Award of £1,017.94 and a Compensatory Award of £3,896.66.

2. The recoupment provisions apply. The prescribed period is 17 July 2018 to 27 December 2018. The grand total is £4,914.60, the prescribed element is £3,299.46 and the difference between the grand total and the prescribed element is £1,615.14.

REASONS

Background

1. After a hearing lasting 4 days between 10 and 13 September 2019, by a Reserved Judgment, Ms Barker failed in her claims of disability discrimination but succeeded in her claim of unfair dismissal.

2. I signed case management orders in respect of preparation for this Remedy Hearing on 24 December 2019, sent to the parties on 13 January 2020. Those case management orders were not complied with.

3. This hearing was originally listed for 9 April 2020. I am not sure what went wrong, neither the Tribunal Members nor I were informed of that date. There was a telephone preliminary hearing before Employment Judge Kurrein that day. He noted that my case management orders had not been complied with and made further directions. I was not aware of this until this morning.

4. The remedy hearing was re-listed for today. Again, neither I nor the Tribunal Members were consulted or informed. As a consequence, Mr Liburd has not been able to take part today; he is in the middle of a multi-day hearing in another region.

5. I explained the situation to the parties. I confirmed that Mr Liburd is a member of the employee panel. Both parties agreed that they wished Mr White and I to proceed and hear the case, rather than for it to be postponed to another day.

Evidence

6. We had before us an agreed bundle in pdf format, indexed and running to page number 135. We also had a skeleton argument from Mr Anderson.

7. Notwithstanding my case management orders, we did not have a witness statement from Ms Barker. What we did have were some typed narratives within the bundle, some in the first person from Ms Barker and some from Mrs Barker.

8. When we started the hearing, (after losing about an hour resolving technical issues) we found that Ms Barker was not present, only Mrs Barker appeared. Mrs Barker told us that she did not realise that Ms Barker would have to give evidence. I explained that there were two particularly contentious issues on which it would be essential that we heard evidence from Ms Barker if we were to reach a fair decision. Those two issues were:

    8.1 Whether she had taken adequate steps to mitigate her losses, and

8.2 Whether, had the respondent done as it ought to have done and obtained an Occupational Health report, (it's failure to do so having amounted to a fundamental breach of contract, which was the reason for Ms Barker's resignation) what percentage chance is there that she would have resigned anyway?

9. Once Mrs Barker understood the difficulty, she made contact with Ms Barker and made arrangements for her to be able to join us after a 30 minute adjournment.

10. We therefore heard oral evidence from Ms Barker. We obtained evidence in chief by my asking a series of questions, followed by cross examination. Mrs Barker was then able to ask any questions to clear up misunderstandings. The documents and statements in the bundle provided a structure for the questions which I asked Ms Barker. She was not asked to attest to the truth of everything that was in those written documents.

The Law

11. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged more than 21 and less than 41, the Basic Award shall be a multiple of the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case). A multiple of ½ applies for each year of service under the age of 21.

12. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

> "*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 insofar as that loss is attributable to any action taken by the employer.*"

13. We would emphasise from the foregoing that the loss must be in consequence of the dismissal.

14. Section 123 (4) provides that a Claimant has the same duty to mitigate his or her loss as would a Claimant under the common law. The burden of proof lies with the employer to show that the Claimant has failed to mitigate loss. The question is not whether the Claimant has behaved reasonably, but whether she has taken reasonable steps to mitigate. She is expected to behave as she would have behaved had she had no

prospect of receiving compensation, (Archbold Freightage Ltd v Wilson [1974] IRLR 10 NIRC).

15. Langstaff J reviewed the law on mitigation in the employment context in Cooper Contracting Limited v Lindsey UKEAT/0184/15 which might be summarised as follows:

15.1 The burden proof is on the wrongdoer.

15.2 The burden of proof is not neutral – if no evidence is offered, the employment tribunal does not have to find a failure to mitigate.

15.3 What has to be proved is that the claimant acted unreasonably.

15.4 There is a difference between acting reasonably and not acting unreasonably

15.5 What is reasonable and unreasonable is a question of fact

15.6 The views and wishes of the claimant is one factor to be taken into account, but it is the tribunal's assessment of reasonableness that counts, not the claimant's.

15.7 The tribunal should not apply too exacting a standard on the claimant, he or she is the victim.

15.8 In summary, it is for the respondent to show that the claimant acted unreasonably.

15.9 It may have been perfectly reasonable for the claimant to have taken a better paid job, that is important evidence, but not itself sufficient.

16. In the case of Polkey v A E Dayton Services Limited [1988] ICR 142, Lord Bridge quoted Browne-Wilkinson LJ from the case of Sillifant v Powell Duffryn Timber Limited [1983] IRLR 91:

> "*If the Tribunal thinks that there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment*."

17. Whilst that case involved redundancy and an unfair procedure, the principles set out in this quotation apply equally to any case of unfair dismissal, for applying section 123(1) requires the Tribunal to award such sum as it considers just and equitable and what is just and equitable must depend, to some degree, on what prospects there were that the Claimant might have been or might in due course have been, fairly dismissed any

way, see Gove and Others v Property Care Limited [2006] ICR 1073. That inevitably entails a degree of speculation, but Tribunals are reminded that speculation is what they have to do, if they are to make an award that is just and equitable in accordance with section 123(1), see Software 2000 Ltd v Andrews [2007] ICR 825. The principle is not limited to cases of procedural unfairness; assessing the percentage chance that employment might have ended anyway is an important element of assessing what award is just and equitable. A reduction in accordance with these principles might be a percentage reduction or it might involve limiting the compensation to a particular period.

Facts

18. Ms Barker's employment with the respondent began on 21 May 2013. It ended on 17 July 2018 when she was aged 26. She therefore had 5 years' service.

19. Ms Barker's gross pay was £226.21 per week. Her nett pay was £199.08 per week. She also benefitted from pension contributions of £53.40 per month.

20. At the time Ms Barker's employment ended, she was already working for the supermarket Asda for 6 hours on a Sunday, 5.5 of those hours being paid, the other half hour an unpaid break.

21. After Ms Barker resigned her employment with the respondent, she did not look for other work. She says that this was because she was undergoing counselling. She continued to work the same hours on a Sunday at Asda, but she did not seek to increase those hours.

22. Ms Barker signed on and received Universal Credit. She attended the Jobcentre once a month to meet with her job coach. She told us that her job coach did not think it was necessary for her to look for other work until she got to the end of her counselling.

23. Ms Barker did extra hours for Asda when they were offered, (what she did not do was seek extra regular routine hours). We were referred to a document at page 63 of the bundle, prepared by Mrs Barker from the payslips which are in the bundle, setting out the pay periods covered by those payslips and listing how much Ms Barker received from Asda. There is a column headed "Extra Pay" in which she purports to summarise the additional pay that Ms Barker received over and above the 5.5 hours on a Sunday. Ms Barker accepted Mr Anderson's calculations that her nett monthly pay working for Asda 5.5 hours on a Sunday before April 2019 was £190.74. We can see that there are therefore months when Ms Barker earned more than that, but the additional pay is not reflected in the extra pay column.

24. Ms Barker has not been able to produce payslips since January 2020 because in order to access her payslips, she has to attend her place of

work at Asda which she has not been able to do as due to her disability, she has been shielding during the Covid-19 lockdown.

Conclusions

Mitigation

25. The respondent argues that Ms Barker has not adequately mitigated her loss. It is for the respondent to prove a failure to mitigate. The question is whether Ms Barker acted unreasonably in not seeking other employment after her resignation and in not seeking to increase her regular hours with Asda.

26. Ms Barker was able to work; she continued working her existing regular hours with Asda. That is enough to raise the question in our minds, has Ms Barker mitigated her loss?

27. When asked why she did not look for other work, her answer was that her counsellor was happy with her doing what she was doing. She could not remember if her counsellor had advised her not to look for work. She said that her job coach at the Jobcentre was happy with her not looking for work until the end of her counselling. She said that she was depressed and that she had lost her confidence. She agreed that her GP had not signed her off as being not fit to work.

28. Ms Barker did not produce evidence from her counsellor to the effect that the counsellor had advised her not to continue working. Ms Barker did not produce evidence from her GP to confirm that she was suffering from depression at the relevant time or that she was unfit for any reason to seek work.

29. We considered whether it was significant that the job coach at the Jobcentre reportedly did not consider it necessary for Ms Barker to seek work and her benefits were not apparently adversely affected by her failing to do so. In the first place, we do not have evidence that either of these facts are true. Secondly, without evidence, we are unable to know one way or the other whether it is significant that a job coach accepted that Ms Barker need not seek work and that her benefits would not be affected.

30. In any event, we must make our own assessment on the evidence before us.

31. Our unanimous view is that as Ms Barker was working at Asda, she acted unreasonably in not seeking further regular hours.

32. Furthermore, we were told that what was attractive about the work at Asda as compared to work for the respondent was that it involved sitting down, (at the till) and that it was in Stowmarket, close to Ms Barker's home. There are other supermarkets in Stowmarket, notably Tesco. There seems to us no reason why she could not have applied for a job there or

indeed supermarkets further afield such as in Bury St Edmunds, where she was able to travel in order to work for the respondent.

33. We acknowledge that it will have taken time to secure the additional hours at Asda or alternative work at another local supermarket. Doing the best that we can, our assessment is that Ms Barker ought to have been in a position where she was matching her income that she had received whilst working for the respondent by the 27 December 2018, some five and a half months after her dismissal.

Polkey

34. The respondent argues that even if it had done as it ought to have done and organised an Occupational Health report in a timely fashion, Ms Barker would have resigned anyway. They say that the Occupational Health report would have said that there is no reason why Ms Barker cannot work beyond 3 o'clock on a Friday afternoon, and that this was the real issue which Ms Barker had with the proposed change to her hours. Mr Anderson referred us to the other six out of seven reasons given by Ms Barker as the reasons for her resignation as set out in the list of issues within our Reserved Judgment, paragraph 19 a to g.

35. Our unanimous recollection of our impressions from the liability hearing are that the respondent's failure in implementing its promise to obtain an Occupational Health report and therefore to appraise itself of information it needed in relation to Ms Barker's very serious health condition, was a source of considerable exasperation on the part of Ms Barker. That was reinforced in the evidence which we heard today. Our unanimous view is that it is likely that whatever the Occupational Health report might, had it been obtained, have recommended, Ms Barker would have gone along with it. We do not know whether that Occupational Health report would have said she could work beyond 3 o'clock on a Friday afternoon. Had it done so, there is a chance that Ms Barker would have taken umbrage and resigned, but more likely in our view, is that she would have complied.

36. We are also of the view that there is a chance that with the other issues that were going on in the workplace and the difficulties with travelling arrangements, she might have at some point chosen to have resigned anyway. We do not put that chance too highly; overall, Ms Barker liked working for the respondent.

37. On balance and doing the best that we can, without avoiding the need for us to enter into some speculation, we conclude that a 20% reduction in compensation is just and equitable to reflect the chance that she would have resigned anyway.

Interest

38. In her Schedule of Loss, Ms Barker claims interest on any award. Interest is not payable on compensation awards for unfair dismissal.

Erroneous Payment

39. In a statement to the Inland Revenue, the respondent said that it had paid £103.90 to Ms Barker in October 2018, (post dismissal). This resulted in her having a temporary reduction in her Universal Credit. She received no such payment. That appears to be accepted. However, as Mr Anderson points out, it is post dismissal and not something which was as a consequence of the unfair dismissal and is not therefore within our jurisdiction.

Cost of Counselling

40. Ms Barker has sought the cost of 21 sessions of counselling in the total sum of £525. This counselling started before the date of resignation. Mr Anderson argues this comes under the heading of compensation for injury to feelings, which is not recoverable in the unfair dismissal regime. We do not agree, in that were Ms Barker to have provided evidence that her unfair dismissal caused her to need counselling, the cost of that counselling could potentially be a financial consequence of unfair dismissal compensatable under s.123.

41. However, we do not have evidence before us that the need for counselling was a consequence soley of the unfair dismissal. On Ms Barker's own case as set out in the statement relating to counselling costs, it was necessitated by the pressure put on her during the pre-dismissal hours negotiations and her perceived harassment by Ms Woodley.

42. In these circumstances, the costs of counselling are not recoverable.

Costs

43. Ms Barker has included in her schedule of costs, fees that she incurred in instructing solicitors to assist her prior to the hearing of her claim. I have explained to Ms Barker and Mrs Barker that recovering costs is not a question of compensation, but a separate issue involving an application for costs. No such application has been made. In brief, the principles are that Employment Tribunals do not usually make orders for costs. We may do so in our discretion, where there has been unreasonable conduct. Before making an application for costs on the basis of unreasonable conduct, Ms Barker ought to bear in mind that in resisting the claim, the respondent has been successful in that her claims for disability discrimination were not upheld.

Cost of visiting Jobcentre

44. As a consequence of her dismissal, Ms Barker had to attend the Jobcentre monthly at a cost of £5. If she mitigated her loss, this would have been necessary for a period of 5 months only. We therefore include in the compensation a figure of £25 in respect of that cost.

Loss of Statutory Rights

45. In our assessment, a figure of £450 is appropriate by way of compensation to Ms Barker for losing her statutory rights arising out of her continuity of employment.

Calculations

46. Our calculations of the compensation payable applying the foregoing is as follows:

	£	£
Basic Award		
£226.21 x 4.5		1,017.94
Compensatory Award		
Prescribed Element –		
17/07/18 to 27/12/18 = 22 weeks x £199.08 =	4,379.76	
Less extra earnings at Asda		
Zero (de minimus) for August		
28/09/18 to 27/10/18 £252.73 - £190.74 =	61.99	
28/10/18 to 27/11/18 £384.18 - £190.74 =	193.44	
Zero 28/11/18 to 27/12/18		
	4,124.33	
Less Polkey reduction 20%	824.86	3,299.46
Non-Prescribed Element –		
Lost pension contributions £54.30 x 5	271.50	
Travel to Jobcentre £5 x 5	25.00	
Loss of Statutory Rights	450.00	
	746.50	
Less Polkey reduction 20%	149.30	597.20
Total		4,914.60

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Employment Judge M Warren

Date: 20 August 2020

Sent to the parties on: 7/9/2020

For the Tribunal Office