EMPLOYMENT TRIBUNALS

Claimant: Mrs R Garnett

Respondent: (1) Rothalcourt Ltd
(2) Mr M Daniels

v

Heard at: Via CVP **On: 7 and 8 September 2020**

Before: Employment Judge Milner-Moore

Appearances
For the Claimant: In person
For the Respondent: Ms Montaz (representative for the respondents)

LIABILITY JUDGMENT AND RESERVED JUDGMENT AND REASONS ON REMEDY

1. The claim of direct age discrimination is not upheld. The respondents did not, in dismissing the claimant, discriminate against her on grounds of age.

2. The claim for a statutory redundancy payment succeeds and the claimant is awarded the sum of £607.50.

3. The claim for unfair dismissal succeeds.

4. The claimant is awarded a basic award of £0.

5. The claimant is awarded a compensatory award of £4,459.99

   (A) Total monetary award: £4,459.99

   (B) Prescribed element: £4,159.99

   (C) Period of prescribed element:
   From 1 March 2019 to 8 September 2020

   (D) Excess of (A) over (B): £300.

6. The claim for breach of contract in relation to failure to pay notice pay succeeds and the claimant is awarded £173.

7. The claim for unlawful deduction from wages succeeds and the claimant is awarded the sum of £70.

RESERVED REASONS

1. After hearing evidence from the claimant and from Mr Daniels and considering a bundle of documents, we reached a decision on the liability issues in relation to the claims set out above. We concluded that the claimant had sufficient continuity of service to bring a complaint of unfair dismissal. We found, that the claimant had been dismissed for redundancy in circumstances which made that dismissal procedurally unfair but concluded that no Polkey reduction was appropriate. We did not uphold the claim of direct age discrimination. We found that the respondent made an unlawful deduction from wages in failing to reimburse the claimant, as it had agreed to do, for prescription and eye test charges. We found that the claimant had been dismissed in breach of contract. Reasons for our conclusions on liability issues were given orally during the hearing and no request for written reasons was made.

2. Having given our liability decision, we then reviewed the claimant's schedule of loss and heard evidence from the claimant regarding the remedy sought in relation to the successful claims. We reserved our decision on remedy.

Remedy issues arising

3. It was not disputed that, in light of our liability findings, the respondent had made an unlawful deduction from wages in failing to make payment of a sum of £70 in respect of prescription and eye test charges.

4. In reaching our decision on liability, we concluded that the claimant had over three years' continuity of service at the date of her dismissal. It was conceded by the respondent that Northampton Laser Clinic (NLC) and Rothalcourt Ltd. (the first respondent) were associated employers for the purpose of calculating continuity. We also found that the claimant's continuity of employment had continued without interruption. It was not therefore disputed that the claimant had received insufficient notice pay, having received only a week's notice pay from the first respondent. However, there was a dispute as to whether one or two weeks' notice should be given. The claimant considered that she should receive a further two weeks' notice. The first respondent argued that credit should be given to reflect the fact that the claimant had been given notice of termination by NLC in 2017 and had received a week's notice pay on that occasion, before then resuming work with the first respondent.

5. It was common ground that, in light of the first respondent's concession as to length of service and our finding that redundancy was the principal

reason for dismissal, the claimant was entitled to a statutory redundancy payment in the sum of £ 607.50.

6. Having concluded that the claimant's redundancy dismissal was procedurally unfair but that no Polkey reduction would be appropriate, it was necessary to determine the amount of compensation that should be awarded to the claimant. The claimant had no entitlement to a basic award given the award of a statutory redundancy payment. However, it was necessary to determine the amount of the compensatory award payable. In doing so we had regard to sections 118 to 126 of the Employment Rights Act 1996 (ERA). We considered, in particular, whether it had been shown that the claimant had failed to take reasonable steps to mitigate her losses such that any compensation awarded to her should be reduced or limited.

Facts

7. The claimant's gross earnings during her last 12 weeks of service were as follows: £690 (February 2019), £810 (January 2019), £580 (December 2019) or £2080 in total, which gives an average gross weekly wage of £173 or £693 per calendar month. The HMRC tax calculator indicates that this wage would be below the threshold for deductions of tax and national insurance and accordingly we have used the figure of £173/£693 in calculating loss for the purpose of the compensatory award and notice pay. The claimant's schedule also included a claim for loss of statutory rights valued by the claimant at £500.

8. We heard evidence from the claimant, who was cross examined by the Respondent's representative as to the efforts that she had made to find employment. The claimant's schedule of loss sought compensation for 6 months loss of earnings on the basis that, after being made redundant on 28 February 2019, she had sought other employment for 6 when, for unrelated personal reasons, she had stopped job hunting. The claimant had received contributions-based Job Seekers Allowance during that period. In order to receive this, she had been required to attend the job centre with a diary recording her efforts to find work. She had applied for 4 receptionist roles and had registered with two agencies but had not succeeded in finding a job. She had an interview at another local Laser clinic but was unsuccessful. She looked at retail and other administrative work but was unable to find anything that fit with her previous working pattern. In June 2019 she began a two-month course to improve her IT skills, which had been recommended by the job centre and which involved roughly a day's study a week. This did not impact on her efforts to find a job. The claimant also underwent an operation on her jaw during this six-month period and was recuperating from this for a few days. During June 2019 she went on a prearranged family holiday for two weeks. By September the claimant had been unable to find work which fitted with her previous working pattern and stopped job hunting.

9. The claimant was cross examined as to whether she had proactively contacted local laser clinics on the off chance that they might have a reception vacancy. She confirmed that she had not done so. The respondent produced evidence of a few receptionist roles advertised at around that time. The claimant accepted that she had not applied for these specific roles.

Law

10. The amount of compensatory award is to be determined by reference to section 123 of the Employment Rights Act 1996 (ERA). The claimant is to be awarded :

    "*such amount 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."* Section 123(1) ERA.

    "*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…"* Section 123(4) ERA

11. Section 86(1)(b) ERA provides that an individual with more than 2 years' service is entitled to one week's notice for each year of service.

Conclusions

12. The respondent alleges that the claimant has failed to take reasonable steps to mitigate her loss. It is for the respondent to show that the claimant has acted unreasonably in failing to take steps to mitigate her loss

13. The respondent produced in evidence details of a couple of receptionist roles which the claimant could have applied for. The claimant's position was that, whilst she had not applied for those particular roles, she had applied for other such roles and had registered with agencies and gone on websites to search for such vacancies. We did not consider that the fact that the respondent had identified a couple of vacancies which the claimant had not applied for was sufficient to establish an unreasonable failure to mitigate.

14. The respondent also relied on the fact that the claimant had not proactively contacted other laser clinic to establish whether they had vacancies. Again, we did not consider that this established an unreasonable failure to mitigate. It is not unreasonable to focus on applying for advertised roles rather than sending in speculative applications to employers who are unlikely to have vacancies.

15. We concluded that, whilst the claimant had not put in extensive evidence of job seeking, there was evidence that the claimant had made genuine efforts to find other work including undergoing training to improve her IT skills. The burden rested with the respondent to show that there had been

an unreasonable failure to mitigate and we did not consider that this was established by the evidence. We did not therefore consider it appropriate to limit compensation to a 6 or 8 week period, as the respondent invited us to do.

16. We awarded the claimant full compensation for the 6-month period 1 March to 31 August 2019 amounting to £4,159.99 (the gross monthly salary of £693 x 6 months). We awarded £300 for loss of statutory rights on the basis that the £500 sum claimed in the schedule of loss seemed to us excessive by reference to normal practice and was not warranted by the length of this employment.

17. We awarded the claimant a further week's notice pay at £173. We considered that the claimant had received two weeks' notice pay in respect of her total period of service rather than the three weeks to which she was entitled (having received one week's notice from NLC in 2017 and one week from the first respondent in March 2019). We considered that it would not have been just, or consistent with s 86 ERA, were the claimant to be awarded a further two weeks' notice now. This would have led to her receiving four weeks' notice in respect of three complete years of service.

Employment Judge Milner-Moore

Date: ……12 October 2020……
10 December 2020
Sent to the parties on: .....

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For the Tribunals Office

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Note:
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.