EMPLOYMENT TRIBUNALS

Claimant: Ms Tina Littler

Respondent: Department for Work and Pensions

HELD AT: Liverpool (by CVP) **ON:** 22 April 2021

BEFORE: Employment Judge Shotter

Members: Mr W Partington
Mrs Eyre

REPRESENTATION:

Claimant: Mr J Heath, solicitor
Respondent: Mr Williams, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

The respondent is ordered to pay to the claimant compensation in the sum of £7757.14 (seven thousand five hundred and fifty-seven pounds and fourteen pence only) consisting of a basic award of £7357.14 as agreed and loss of statutory rights of £400.00.

REASONS

Preamble

1. This has been a remote hearing by video which has been consented to by the parties. The form of remote hearing was Code V: Kinley CVP video whether partly (someone physically in a hearing centre) or fully (all remote). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 347 pages, the contents of which I have recorded where relevant below. The order made is described at the end of these reasons.

2. This is a remedy hearing following promulgation of the judgment orally given with reasons to the parties on the 27 November 2020. Judgment only was promulgated on the 31 December 2020. The claimant was found to have been unfairly dismissed and in accordance with the principle in Polkey v AE Dayton Services Ltd [1987] ICR 42 had the respondent carried out a fair procedure the claimant would have been fairly dismissed on the 11 March 2019, the effective date of termination.

3. The parties agreed to provide written submissions on the principles of set off and it was agreed remedy would be decided on the papers without the parties appearing before the Tribunal. The Tribunal has before it the claimant's written submissions together with attachments dated 22 April 2021, and the respondent's submissions with attachments dated 3 December 2020, which the Tribunal has taken into account.

4. There is an issue with the respondent as to whether the Tribunal found the claimant would have been dismissed by 11 April 2019, one month after she was in fact dismissed. The Tribunal found under the "Polkey no difference rule" the claimant would still have been fairly dismissed for the reasons set out in the letter dated 8 March 2019 from Gill Rothwell setting out the reasons why she took the decision to dismiss i.e. "the support you have received to help you assist you return to work, including a permanent change in your current pattern and a temporary offer of a reduction to your working pattern that would frequently be reviewed…you have failed to maintain an acceptable level of attendance and have been unable to return to work within a timescale that I consider reasonable." The claimant's solicitor's note was correct in this regard, and there is no compensation for loss of earnings.

5. There is very little difference between the parties on the quantification of remedy. The claimant is entitled to a basic award only and a compensatory award consisting of loss of statutory rights. The basic award has been agreed at £7,357.14 as adopted by the claimant pursuant to paragraph 14 of the oral submission. The loss of statutory rights figure claimed is £750 on the part of the claimant and £500 in the respondent's counter-schedule. The respondent submits £750 is excessive, the Tribunal agrees taking into account the specific circumstances of this case. An employee who has been unfairly dismissed loses the right not to be unfairly dismissed until he or she has worked long enough for a new employer (two years) to qualify for the right again. Ms Littler would have been fairly dismissed from her employment in any event and it is just and equitable to reduce the compensatory award she seeks to £400.00 and not nil as suggested by the respondent, to mark the fact she was unfairly dismissed and is entitled to a statutory payment.

6. The key issue in this remedy hearing is concerned with the respondent's argument that the claimant's compensation should be reduced to nil for the following reasons as set out in the written submissions:

6.1 The claimant received compensation under the Civil Service Compensation Scheme ("CSCS") in the sum of £15,241 (to the nearest pound).

6.2 The award is discretionary (rule 11.1(a)) and calculated by reference to age and length of service (rule 11.1(a) and 3.3). It was not a negotiated award but this is not determinative, the payment was at the respondent's discretion and the claimant "chose to accept the payment knowing all the material circumstances". It is notable there was no evidence the claimant formally accepted the CSCS award before it was paid. according to Mr Heath the monies were automatically paid in to the claimant's bank account. The Tribunal has concluded on balance that when the claimant accepted the monies transferred into her account (she did not repay them to the respondent) it was not in the knowledge that should she succeed in an unfair dismissal complaint set off for the full award would follow with the result that there could be no financial benefit to the claimant if the award was extinguished.

6.3 The claimant must give credit against compensation for loss of statutory rights which forms part of the compensatory award. The claimant in her schedule of loss accepts the CSCS award can be offset against the compensatory award. It was submitted on behalf of the respondent that there is "no sound basis on the face of the offer for drawing a distinction between the compensatory element and the basic award element."

6.4 The CSCS ex gratia compensation should be set off against the basic award. The Tribunal was referred to the EAT decision in Chelsea Football Club v Heath [1981] ICR 323 as it covers all types of compensation and "expressly and directly relates to the claimant's dismissal." The Tribunal accepts that had the claimant not been dismissed the CSCS award would not have been paid for loss of office.

6.5 Unfair dismissal was an issue in the contemplation of the parties at the time the CSCS award "was offered." The Tribunal was referred to the claimant's letter dated 16 January 2019. This letter is titled "Grievance follow up – Tina Riley Flexible Working Request Appeal" and it is not a letter referencing unfair dismissal. The Tribunal found that at the time the letter was written it is not clear that unfair dismissal was in the contemplation of either party. The Tribunal was also referred to the claimant's appeal against dismissal during which the claimant made a clear reference to constructive unfair dismissal. However, there was no evidence before the Tribunal the CSCS payment was "offered" with the possibility of setting off any damages awarded for unfair dismissal and the Tribunal finds for the reasons set out below that this was not the case. It appears to the Tribunal that under the CSCS it appears all employees may be entitled to compensation when they leave the civil service under early severance, voluntary or compulsory redundancy or on dismissal on efficiency grounds. The legislative authority for the CSCS is the Superannuation Act 1972. This provides a broad enabling power to establish, maintain and administer a scheme to provide compensation on loss of employment.

7. Mr Heath explained the nature of payment made under the CSCS and referred the Tribunal to two cases dealing with judicial review held in the Administrative Court R (Public and Commercial Services Union) v Minister for the Civil Service [2010] EWHC 1027 (Admin) at paragraphs 10, 43, 45, 47-56 and Administrative Court R (Public and Commercial Services Union) v Minister for the Civil Service [2011[EWHC 2041 (admin) in which it was held by McCombe J (as he then was) "that civil servants

'administrative expectations' under the CSCS are sufficiently valuable and concrete to amount to 'possessions' as defined in Article 1 pf the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms." In submissions made on behalf of the claimant it was argued:

7.1 A payment made under the CSCS in discharge or satisfaction of a legal obligation other than the claimant's statutory entitlement to a basic award is neither ex gratia nor referable to the claim for a basic award and must be disregarded. On the limited evidence before the Tribunal this appeared to be the case that the CSCS was not referable in any way to compensation for unfair dismissal, and the ex gratia element related to the amount, if any, of the award, assessed by reference to tables referred to further below.

7.2 Section 11.4.2 of the Civil Service Management Code obliges the decision maker to consider whether a departing employee should receive an "inefficiency payment" and the amount calculated by a mathematical formula which can be reduced at the decision makers discretion. The Tribunal notes that in the claimant's case it was reduced by 25**%,** and this figure was calculated with reference to the tables set out in the Cabinet Office Efficiency Compensation 2016, the claimant having met the definition of a member of staff departing on "Inefficient grounds." The Cabinet Office Efficiency Compensation 2016 provides; "Section 11.4 of the Civil Service Management Code sets out the discretion which departments and agencies have to pay compensation in cases where staff depart on Inefficiency grounds…Efficiency Departures are made to balance the interest and the wellbeing of the individual and in the interests of the continued efficiency of the Department. Compensation should be considered for civil servants when they are dismissed on efficiency grounds under section 6.3 of the Civil Service Management Code. The objective of the compensation is to compensate the employee for loss of employment that is beyond their control; not to compensate for poor performance or poor attendance when there is no underlying health condition. Compensation is not guaranteed."

7.3 There is no reference in any of the documentation produced in the CSCS or Cabinet Office Guidance that references employment tribunals, statutory awards and the right of set off. The Tribunal has considered both documents; the CSCS is dated March 2015, a complex document that runs to 104 pages. Suffice to say that no party has been able to point the Tribunal to any reference to a basic award, loss of statutory rights or clear statement to the effect that the CSCS award payment to a dismissed employee expressly covers all possible liability arising out of an employee's complaint to a Tribunal.

7.4 The respondent did not have an unfettered discretion to make an ex gratia payment under CSCS; the claimant had no legal right to an amount but she had a legal right in relation to the operation of the scheme and the proper use of the respondent's discretion and duty under the principles of public law. On the limited information before the Tribunal this appeared to be the case. An analogy is drawn with discretionary bonus cases, such the bonus referenced in Clark v Nomura International plc [2000] IRLR 766 where an employer is required to exercise its discretion about whether to pay a bonus in a rational and non-perverse fashion.

Presumably the point being made is that that payment under the CSCS is not a "true ex gratia' payment unlike a discretionary bonus i.e. the discretion is relevant to the amount of CSCS compensation only, however it appears that nil award can be made according to the respondent and this was not disputed by the claimant.

7.5 The claimant agrees with the respondent the absence of negotiation and the discretionary nature of the payment does not alter the analysis.

The law

8. Any agreement to forgo a statutory employment right is void under S.203 of the Employment Rights Act 1996 ("ERA"). An attempt by an employer to settle an unfair dismissal claim will be void and the agreement will not preclude the employee from pursuing a claim even if he or she accepts the money unless (i) where the settlement is formally incorporated in a tribunal decision; (ii) where it is reached under a ACAS COT3 in accordance with S.203(2)(e); or (iii) where it satisfies the conditions for settlement agreements contained in S.203(3).

9. In Chelsea Football Club referred to above, the claimant was unfairly dismissed and then given a cheque for £7,500 by the employer described as 'ex gratia compensation'. The tribunal held that none of the statutory grounds for reducing a basic award applied. Therefore, although £7,500 exceeded the maximum amount which it could have awarded H at that time, the tribunal proceeded to make a basic award of £1,920. On appeal, the EAT pointed out that the employer's argument was not that there should be a reduction in the basic award but rather that it should not be ordered to pay one at all because it had already paid the basic award as part of the £7,500. The EAT said that whether or not a severance payment should be treated as extinguishing liability for a basic award was a 'question of construction'. If an employer stated clearly that a severance payment was intended to meet any possible liability for basic or compensatory awards that might be made by a tribunal, then it would have no further liability (provided the payment was large enough). However, when the employer simply makes a general payment — particularly one expressed as being 'ex gratia' — it will run the risk of a tribunal treating that payment as if it did not refer to unfair dismissal liability at all.

10. The Tribunal's starting point is the letter of dismissal dated 8 March 2019 when the claimant was dismissed for unsatisfactory attendance. The claimant was informed in the letter, so far as is material, "you will be paid 75% compensation under the Civil Service Compensation Scheme for being dismissed for unsatisfactory attendance." An explanation was given as to why the payment was made as follows: "This reflects the efforts you have made to improve your level of attendance by keeping in touch with your GP and relevant counselling services and continuing with your medication and reflects that you kept in touch with the Department for most of the time throughout your absence." There is no reference to the payment being made to cover all possible liability arising out of a future employment tribunal claim, and it cannot be said this eventuality was in the contemplation of the parties when the payment was made directly in to the claimant's bank account without agreement. Mr Heath indicated the claimant had appealed the CSCS payment, the Tribunal is unaware of this or the outcome.

11. It is not disputed there was no statutory grounds for reducing the basic award, for example, a redundancy payment extinguishing the award.

12. The issue for the Tribunal to decide is whether the payment made to the claimant under the CSCS in the circumstances of this case, should be considered in the calculation of the damages flowing from the claimant's unfair dismissal and the Tribunal found that it should not in relation to the basic award, a statutory payment to which the claimant is entitled and the respondent has not stated clearly that the payment was intended to meet any possible liability for basic or compensatory awards: Chelsea Football Club above.

13. Turning to the compensatory award; the claimant had an expectation that there would be set off for the CSCS payment as set out in the schedule of loss.

14. Section 123(1) ERA provides: "… 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."

15. The Tribunal concluded, in the circumstances of this case, it was just and equitable to award the claimant the sum of £400 by way of loss of statutory rights as the evidence before it was that the CSCS payment made to the claimant would have been made to her in any event, whether she brought a claim of unfair dismissal or not, and it should not be brought into account when calculating the compensatory award for unfair dismissal. It has also considered the respondent's submission that the claimant would have been dismissed in any event and lost her statutory right to claim unfair dismissal. When assessing the amount at £400.00.

16. In conclusion, the respondent is ordered to pay to the claimant compensation in the sum of £7757.14 (seven thousand five hundred and fifty-seven pounds and fourteen pence only) consisting of a basic award of £7357.14 and loss of statutory rights of £400.00.

Employment Judge Shotter

22.4.2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 April 2021

FOR THE SECRETARY OF THE TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2410333/2019**

Name of case: **Ms T Littler** v **The Department for Work and Pensions**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding discrimination or equal pay awards or sums representing costs or expenses), shall carry interest where the sum remains unpaid on a day ("*the calculation day*") 42 days after the day ("*the relevant judgment day*") that the document containing the tribunal's judgment is recorded as having been sent to the parties.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant judgment day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: **28 April 2021**

"the calculation day" is: **29 April 2021**

"the stipulated rate of interest" is: **8%**

For and on Behalf of the Secretary of the Tribunals