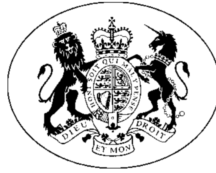

EMPLOYMENT TRIBUNALS

Claimant: **Ms. Janine O'Harris**

Respondent: **Domitille Rambaud**

Heard at: **CVP hearing London Central** **On:** **4 February 2021**

Before: **Employment Judge Russell (sitting alone)**

Appearances

For the Claimant: **In person**

(permitted representation Remedy hearing only)

For the Respondent: Mr C Rice, Solicitor

JUDGEMENT

A. The Claimant was unfairly dismissed. She was automatically unfairly dismissed under section 100 (1)(c) ERA 1996 as the principal reason for her dismissal on 10 June 2020 was that she had brought to the Respondent's attention circumstances connected with her work which she reasonably believed were harmful or potentially harmful to her health and safety .

B. The Claimant's continuous employment commenced on 29 May 2018 and so she had more than 2 years continuity of service at her EDT and she was unfairly dismissed under Section 98 ERA 1996.

C. The Respondent is ordered to pay to the Claimant £38,292.65 by way of compensation as per the schedule provided below the reasons for this Judgement on liability and remedy.

Background

1. The Claimant has some 26 years' experience and was working as a Nanny for the

Respondent and her family until she was dismissed (without warning but with notice pay) on 10 June 2020. The Claimant filed an ET1 in which she claimed that she had been unfairly dismissed by the Respondent, on 10 June 2020, for raising issues about the failure of the Respondent's partner to follow what she understood to be government guidelines, requiring a person who had been to France to quarantine for 14 days on returning to the UK.

2. The ET3 which the Respondent served over 3 weeks out of time states that (a) the Claimant did not have sufficient service to claim ordinary unfair dismissal and (b) the reason for the dismissal was nothing to do with the Claimant's discussion about the quarantine period but that the Respondent had concluded that the Claimant did not like the Respondent's husband being at home observing her, that her relationship with the children was not as positive as it should be and that the Claimant was regarded as being inflexible in discharging her duties. The Respondent admitted that no procedure had been followed at all but said it would have been impractical in a private family environment involving the care of two young children, that it would have damaged the relationship of trust and positivity and would have made no difference to the outcome as the relationship had ceased to be sufficiently positive in the Respondent's view.

3. EJ Walker determined on 2 December 2020 that the Respondent's rule 20 application (to the extent properly made) to extend time for the filing of the defence was refused and the Respondent would only be permitted to take such further part in proceedings as the trial Judge allowed. Judgment was not entered in default as there were issues to be determined as to jurisdiction and liability through the pleadings and hearing the Claimant's evidence. Which I heard today along with submissions from her solicitor and subsequently submissions on remedy from the Respondent who observed the whole hearing but was only permitted to take an active part (including cross examination) in the remedy part of the full hearing.

Findings on Liability

4. The Respondent's partner, Mr Granatino, refused to self-isolate when returning from France (June 2020) against government guidelines at the time. He gave no substantive reasons beyond stating that he was protected by antibodies. He went to work as normal and objected to polite questioning by the Claimant as to his refusal to adhere to the rules.

He may have believed he had had COVID-19 and or had some other reasons to ignore the government health guidelines but the Claimant was concerned as to her own health (as an Asthma suffer) and that of her own partner (diabetes as an underlying condition) and the Claimant's mother whom she cared for. She was genuinely and legitimately worried about her and her family's health and safety as a consequence of the actions of the Respondent and her partner. But having raised these concerns directly with her employer household under s 100 (1) (c) ERA 1996 she was, the very next day, dismissed. And the reason given at the time were limited to saying Mr. Granatino would look after the children himself which is patently not the real reason as later highlighted by the subsequent employment of a replacement nanny and ET3.

5. I suspect the Respondent and her partner had in her mind that the Claimant had signed to a start date of 7 August 2018 and observe in their late filed ET3 they admit to a total lack of procedure but justify this on the basis that the Claimant had less than 2 years' service. But she did not. Certainly, there was no fair dismissal procedure, no conduct or capability issues were raised, formally or informally and no disciplinary hearing took place. There was a complete absence of process. One cannot expect too much when the employer is effectively a family with one employed nanny. However, I find that in this case the complete lack of any procedure and the timing of the dismissal and false reason (even on the Respondent's subsequently pleaded evidence now) simply confirms the real reason for the dismissal as well as the unfairness of it .

6. The Claimant was dismissed because she made her health and safety complaint. But it was a concern she was quite entitled to have, a complaint that she was perfectly entitled to make and there is no suggestion that she made it in other than a thoughtful and reasonable way.

Findings on Remedy

7. It is clear the Claimant has made committed efforts to find alternative employment. She was of course initially hampered by losing her job suddenly, and of course unexpectedly, and then by the ongoing pandemic. She has signed on with 3 nanny agencies and had applied for many jobs as is evident from mitigation papers provided with the trial bundle. She has attended interviews and made considerable efforts to get employment as a nanny. Her preferred choice of career, and one I accept she was entitled to try and continue. I do not accept the Respondent's evidence that she could have got a job without

2 – 3 months with more effort and am satisfied that for a nanny with the high importance of face-to-face contact plus, trust and rapport, that these are unprecedented and difficult times to get a suitable job. She was also hamstrung by having to use public transport in London which has often not been possible or safe in the last 8 months.

8. The Claimant gave evidence that she loves being a nanny and wants to work and making efforts to do so. Her previous job before working for the Respondent lasted 8 years. I accept that evidence and her decision to have not claimed state benefits and to rely on her working partner and using savings is also accepted and respected. She has discharged her duty to mitigate and continues to search for an alternative role.

9. Finally, although the vaccine roll out has begun it is legitimate to find that it may be another 6 months before she can get viable employment once more. That this situation arises to the detriment of the Respondent is in a large part due to the unfairness of the dismissal in the first place. In that the Respondent then inherits the problem job market on remedy just as the Claimant has faced it in practice. No doubt exacerbated by the absence of a guaranteed favourable reference.

10. There was no disagreement by the Respondent as to the Claimant's gross or net earnings or any other part of the Claimant's schedule of loss other than in respect of the claimed ACAS award uplift. However, this is a clear case, where no procedure whatsoever was followed, of an uplift being appropriate under s 207A TULRCA1992 and at the maximum level of 25%. And the award made to include the basic and compensatory award reflects this and is therefore at £38,292.65 as set out below based on the Claimant's schedule of loss and after the Gourley principle was applied. The statutory cap does not apply given the judgement that this was an automatically unfair dismissal. The Claimant is liable to pay some tax under s 401 ITEPA 2003. But the Respondent is ordered to pay her £38,292.65 without deduction and the Claimant is invited to advise the Respondent of her preferred means of payment being made. I reminded the Respondent that the order for payment was effective today and the debt now immediately due.

SCHEDULE

REMEDY COMPENSATION

Janine O 'Harris			
1. Details			

Annual Salary	£35,546		
Gross Weekly Basic	£683.59	**Capped: £538**	
Net Weekly Basic Pay	£512.37		
Notice Period (weeks)	4		
DOB	31/12/1973		
	From	To	
Period of Service	29/05/2018	10/06/2020	
Complete Continuous Service	2.0		
Age at EDT	46		
Basic Award		**£1,614.00**	
2. Compensatory Award			
Loss to Tribunal			
Weeks from EDT to ET	34		
3.1 Loss of basic salary		£17,420.58	
3.2 Loss of Statutory Rights		£500.00	
3.3 Loss of pension (£16.91 pw)		£574.94	
Less			
3.4 Notice pay		£2,049.48	
3.5 tax rebate		£1,970.09	
Total Past Loss		**£14,475.95**	
Future Loss			
Anticipated weeks without work	26		
3.4 Future Loss of Earnings		£13,321.62	
3.5 Future loss of pension (16.91 per week)		£439.66	
Total Future Loss		**£13,761.28**	
Total loss and adjustments			
3.6 - % Increase for failure to comply with ACAS Code (Compensation loss only)	25%	£7,059.31	

Total Compensatory Award			**£35,296.54**
4. Total Award			
4.1 Basic Award	£1,614.00		
4.2 Compensatory Award	£35,296.54		
Sub Total Award		£36,910.54	
Grossing up			
5.1 Amount less 30k tax exemption to be grossed up		£6,910.54	
5.2 Grossing up under GOURELY principle @ basic tax rate of 20%		£8,292.65	
Total award		£38,292.65	
NB Statutory Cap OF ONE YEAR'S GROSS EARNINGS OF £35,546.00 NOT APPLICABLE UNDER S 100 ERA 1996			
No welfare benefits /recoupment			
Total Award			**£38,292.65**

EMPLOYMENT JUDGE -Russell

4 FEBRUARY2021 Order
sent to the parties on

29/04/2021

for Office of the Tribunals