



# EMPLOYMENT TRIBUNALS

**Claimants:** 1. Mrs S Ridge  
2. Mrs R Grainger

**Respondent:** Avery of Loxley Park (Homecare) Ltd

**Heard at:** Leeds Employment Tribunal (via CVP)

**On:** 5 May 2021

**Before:** Employment Judge K Armstrong

## Representation

Claimant 1 (Mrs S Ridge): In person

Claimant 2 (Mrs R Grainger): Mr S Walton, lay representative

Respondent: Mr M Carroll, respondent's employee relations advisor

# JUDGMENT

1. Paragraph 4 of the Judgment dated 19 March 2021 shall be amended to read as follows: 'The compensatory awards, after the first two weeks' compensation, shall be reduced by 60% on the grounds that it is just and equitable to do so because there was a 60% chance each claimant would have been dismissed had there been a fair hearing.'
2. The compensatory awards of both claimants shall be increased by 25% on the grounds of the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.
3. The basic awards of both claimants shall be reduced by 20% on the grounds that it is just and equitable to do so because of their conduct before the dismissals.
4. The respondent shall pay to the first claimant, Mrs S Ridge, the sum of **£2,333.26**

5. The respondent shall pay to the second claimant, Mrs R Grainger, the sum of **£5,781.49**

## REASONS

### Hearing

1. This hearing was listed following a reserved judgment dated 19 March 2021 in which it was found that both claimants were unfairly dismissed by the respondent on 7 August 2020. Also in that judgment it was determined that a 60% '*Polkey*' reduction and 20% reduction as a result of the claimants' actions which contributed to their dismissal by virtue of s.123(6) Employment Rights Act 1996 (ERA 1996) should apply to the compensatory awards of both claimants.
2. The hearing today took place via video hearing, namely CVP. The reason for the hearing was due to the current guidance as a result of the COVID-19 pandemic. The parties were all content for the hearing to proceed via CVP and all parties were able to fully participate in the hearing.

### Issues

3. The issues as set out in the directions following the substantive judgment, and confirmed with the parties at the outset of the hearing, were as follows:

#### Compensatory award

- 3.1. What financial losses has the dismissal caused the claimants?
- 3.2. Have the claimants taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.3. If not, for what period of loss should the claimants be compensated?
- 3.4. Did the respondent or the claimant unreasonably fail to comply with ACAS Code of Practice on Disciplinary and Grievance Procedures such that the award should be increased or decreased by up to 25%?

#### Basic award

- 3.5. What basic award is payable to the claimants, if any?
- 3.6. Would it be just and equitable to reduce or extinguish the basic award because of any conduct of the claimant before the dismissal?
4. In addition, the parties were notified in advance of the hearing that the Tribunal was minded to reconsider paragraph 4 of the judgment of 19 March 2021, as follows, and that this would be considered at the hearing on 5 May 2021:

‘The Tribunal is considering a variation of paragraph 4 of the judgment sent to the parties on 19 March 2021 to read as follows:

‘The compensatory awards, after the first two weeks’ compensation, shall be reduced by 60% on the grounds that it is just and equitable to do so because there was a 60% chance each claimant would have been dismissed had there been a fair hearing.’

The grounds for the reconsideration are that it is apparent that paragraph 4 of the judgment as drafted does not reflect paragraph 102 of the reasons for the decision where the Tribunal determined that a fair procedure would have taken a further two weeks and that the reduction in compensation in that respect should apply after that point.’

### Evidence

5. I was provided with a schedule of loss from each claimant. The first claimant also provided a witness statement. The second claimant provided bank statements, a job application, and two payslips. The respondent provided both claimants’ last three payslips and P60s. I also considered the bundle of documents provided at the last hearing.
6. Both claimants gave oral evidence and were asked questions by Mr Carroll on behalf of the respondent. I heard submissions from all parties.

### Applicable law, findings, and decisions.

#### Basic Awards – both claimants

7. There was a dispute as to the appropriate basis for the calculation of a week’s pay for the purposes of calculating the claimants’ basic awards. The claimants contended for an average figure over the past 12 weeks or months which included their overtime. The respondent submitted that the correct figure is the claimants’ contractual hours, without overtime. It was agreed that Mrs Ridge’s contractual hours were 35 hours per week and Mrs Grainger’s were 21 hours per week. The hourly rate of pay was agreed. It was accepted that both claimants in fact worked additional overtime at their normal rate, the hours of which varied from month to month.
8. I am satisfied that for the purposes of calculating the basic award, a week’s pay is the claimants’ contracted hours, and not the overtime they worked. Section 234 ERA 1996 provides that when an employee is entitled to overtime pay when employed for more than a fixed number of hours in a week there are for the purposes of the Act normal working hours. The normal working hours will be the fixed number of hours. Both employees’ contracts (included within the bundle for this case) provide for a fixed number of hours, plus overtime pay if employed beyond that.
9. Therefore for the purposes of s.221 ERA 1996 they have normal hours, which are their contractual hours.

10. I then considered any reduction to the basic award. I am not satisfied it is appropriate to reduce the basic awards by 60% as contended for by the respondent. The '*Polkey*' exercise only applies to the compensatory award. It arises on the application of s.123 ERA 1996 which provides that the compensatory award should be such amount as just and equitable in all the circumstances. The basic award, by contrast, is a fixed sum calculated using the statutory formula. The basic award can only be reduced under s.122 ERA 1996 for specific reasons - including where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the basic award to any extent.
11. I am satisfied that a 20% reduction for this reason should apply to the basic award for the same reasons as it applies to the compensatory award in relation to the claimants' actions, and as I set out in the decision of 19 March 2021.

#### Compensatory awards – both claimants

12. I have considered whether to increase the compensatory awards by 25% under s.207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992). This section provides that the Tribunal may if it considers it just and equitable to do so increase any award to the employee by up to 25%, in cases where a relevant code of conduct applies. It was agreed and I am satisfied that the ACAS code in relation to disciplinary and grievance procedures applies here.
13. The section applies where the employer has unreasonably failed to comply with the code. It follows from the findings that I have made regarding the procedure in this case that the respondent unreasonably failed to comply with the code of practice. Specifically, the charges against the claimants were not made clear to them and were unfairly amended, the claimants were not given sufficient notice to prepare for their disciplinary hearings, and the appeal process was not fair. I am satisfied that these are sufficiently serious failings to justify a 25% increase in the compensatory awards to both claimants.
14. The respondent did not invite me to reduce the compensatory awards under this section, and I am satisfied that it would not be just and equitable to do so. There are no findings or evidence that the claimants failed to comply with the relevant code.
15. I have also considered compensation for loss of statutory rights. Both claimants will take some time to regain the statutory rights they had accrued in their employment with the respondent. This was not pleaded by the claimants but was properly raised by the respondent. I am satisfied that it is appropriate to award £350 to each claimant in this respect.

#### Reconsideration

16. None of the parties objected to the Tribunal's proposal to reconsider the previous order to provide for the '*Polkey*' reduction of 60% to the claimants' compensatory awards to apply after two weeks, in line with the Tribunal's findings of fact.

17. I am satisfied that it is in the interests of justice to do so, for the reasons set out above.

First Claimant, Mrs S Ridge

Basic award

18. Applying the reasoning above, a week's pay is £323.75 (Using the respondent's figure: contracted hours of 35h pw x £9.25ph). Multiplied by 4.5 (3 years' service, aged 47 at effective date of termination) = £1,456.88. This is reduced by 20% under s.122 ERA 1996 = **£1,165.50**.

Compensatory award

19. The first claimant is only claiming 2 weeks' loss of earnings because at this stage she secured alternative employment on higher pay.

20. I find that the correct figure for a week's pay in this respect is more than the figure for the basic award. The purpose of the compensatory award is to compensate for any losses sustained in consequence to the dismissal. Those actual losses are higher than the figure for the basic award, because had the first claimant continued in her employment she would have worked overtime and therefore earned more than the statutory week's pay set out above.

21. I have taken the average weekly net pay from her last 3 pay slips. The 3 payslips are relatively consistent because she picked up some extra training time which made up for the reduced overtime in the last month when she was suspended. This gives a figure of £408.88 x 2 = £817.76.

22. I also award compensation for loss of statutory rights of £350

23. Total compensatory award = £1,167.76

24. The case law sets out the order in which I should apply the adjustments

25. The compensatory award is not reduced by 60% because this does not apply to the first 2 weeks' pay.

26. Increase by 25% under s.207A TULR(C)A 1992 = £1,459.70

27. Reduction of 20% under s.123 ERA 1996 = **£1,167.76**

Second Claimant, Mrs R Grainger

Basic Award

28. As set out above, this is calculated at 21 hours pw x £8.77ph = £184.17 pw. Multiplied by 8.5 (42 at date of dismissal. 8 years' service) = £1,565.45. Reduced by 20% under s.122 ERA 1996 = **£1,252.36**

Compensatory award

29. Mrs Grainger submitted bank statements showing that she borrowed some money from friends. She said in her oral evidence that this was borrowed so that she could meet her mortgage payments until her universal credit payments started. She told me that she then paid her friends back and they did not charge her interest. Therefore there are no losses arising from this which require compensation.
30. Mr Carroll on behalf of the respondent put to the second claimant that she was 'demotivated' from seeking employment because she was in receipt of around £500 pm universal credit. The claimant denied this. I am satisfied that she was not demotivated from finding work because she was in receipt of universal credit. I accept her evidence that she in fact did not receive the benefit until she had secured work, and that she still wishes to increase her earnings to provide for her family, despite receiving the universal credit payment.
31. Mrs Grainger also gave evidence that she was provided with a 'fit note' by her doctor certifying that she was not fit for work for an 8-week period shortly after her dismissal. She said that she had telephoned her GP because she was extremely stressed as a result of the dismissal and had lost about two stone in weight. She did not ask for a 'fit note' but her GP signed her off as unfit for work and provided her with a note. She collected the note from her GP but did not use it and in fact continued to seek and secured employment during this period.
32. Mr Carroll points out that there is no medical evidence provided to substantiate this claim.
33. I accept that the second claimant was stressed following her dismissal, and this may well have had some medical consequences. Whether or not she was provided with a 'fit note' does not affect my decision, as I am satisfied that she continued to seek employment during the period that this covered. She secured employment on 1 September 2021, only 3-4 weeks after dismissal. This is a reasonable period for the claimant to take to recover from the dismissal itself and to find her feet again.
34. I accept that it is difficult in the current climate to find work that fits around childcare, and this means that the claimant has had to accept work with less opportunity for overtime. The hourly rate for the bakery job she has secured is at the same as she previously earned, and the cleaning job is slightly higher. I note that the claimant was previously contracted to work 21 hours pw and is now working 16-20 hours pw. The main shortfall is in the loss of overtime, which I shall return to below.
35. As set out above in relation to the first claimant, the second claimant's ongoing losses are the difference between what she would have been earning at the respondent compared to what she is earning now. On the evidence I have, I find that her net weekly earnings with the respondent would have been the average from the two payslips of 30 June and 31 July 2020. I accept that the final payslip (August 2020) is significantly less because she was not working any over time whilst suspended. The average of those 2 payslips net is £293.86.

36. Her losses from 7 August 2020 (effective date of termination) to 1 September 2020 were therefore: 3 weeks x £293.86 = £881.58
37. On 1 September 2020 Mrs Grainger secured a cleaning job, and on 12 October 2020 she secured a second job at a bakery in addition. From 1 September to 12 October 2020 she earned £10ph x 6 hours = £60 gross. I am unable to work out what her net pay would have been as this is not shown on the payslip provided. However it seems likely that this amount of earnings would fall within her tax-free allowance. There was a period during which she was placed on furlough but as I have not been provided with the dates of this, I am unable to account for it within my calculations. Therefore her losses during this period I have calculated on the evidence I have to be £233.86 pw x 6 weeks = £1,403.16
38. From 12 October 2020 Mrs Grainger secured a job in a bakery working between 6-10 hours per week. This was at £8.77ph but has recently increased to £8.91 per hour. I have been provided with one payslip which shows a net payment of £274.68 for 31.5 hours dated 25 December. I take this as an average month and therefore work on the basis that her ongoing earnings from this job are £274.68 divided by 4 = £68.67 pw
39. Therefore from 12<sup>th</sup> October 2020 she has been earning on average £68.67pw plus £60 pw = £128.67pw. This is a shortfall of £165.19pw. This is roughly in line with the claimant's calculation that her ongoing losses are £166 pw.
40. From 12 October 2020 to today's date = 29 weeks x £165.19 = £4,790.51.
41. Her losses to today's date are therefore: £881.58+ £1,403.16+£4,790.51 = £7,075.25.
42. Mrs Grainger is claiming a further 6 months of future losses. In the current economic climate and given her child-care commitments I accept that this is reasonable. I accept the second claimant's figure for this of £3016.
43. I also award compensation for loss of statutory rights of £350.
44. Total compensatory award = £7075.25 + £3016 +£350 = £10,441.25
45. *Polkey* reduction: This does not apply to the first 2 weeks therefore £587.72 is awarded at the full rate. 60% reduction to the remaining £9,853.53 = £3,941.41. £3,941.41 plus £587.72 = £4,529.13.
46. Increase by 25% under s.207A TULR(C)A 1992 = £5,661.41
47. Reduce by 20% under s.123 ERA 1996 = **£4,529.13.**
48. The Employment Protection (Recoupment of jobseekers' allowance and income support) Regulations 1996 apply as the Claimant has been in receipt of universal credit. The effect of this is explained in the attached Annex. The monetary award is: £5,781.49. The prescribed element is: £3,182.73. The prescribed element relates to the period 7 August 2020 to 5 May 2021. The monetary award exceeds the prescribed element by

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£2,598.76. These figures are slightly different from the figures handed down in oral judgment due to a miscalculation. The prescribed element of £3,3359.04 is calculated as follows: £587.72 at full rate plus 40% of (£293.86+ £1,403.16 + £4,790.51) = £3,182.73.

Employment Judge **Kate Armstrong**

5 May 2021