EMPLOYMENT TRIBUNALS

Claimant: Ms G Oksuzoglu

Respondent: London Borough of Haringey

Heard at: Watford Employment Tribunal **On:** 28 May 2021

Before: Employment Judge Quill; Mr S Bury; Ms S Goldthorpe

Appearances
For the claimant: In person
For the respondent: Mr J Davies, counsel

REMEDY JUDGMENT

(1) Because it unfairly dismissed the Claimant, the Respondent is ordered to pay the Claimant £3127.94, which comprises the following:
   (i) Basic Award of £3475.48 reduced by 10%
   (ii) No compensatory award
(2) There is no basis for an uplift for failure to follow the ACAS Code.

REASONS

Introduction

1. We gave judgment with reasons orally and we were asked to supply written reasons. These are those reasons.

2. Following a hearing 6 to 10 November 2017, before EJ Henry, Mr Bury and Ms Goldthorpe a liability judgment was sent to the parties on 10 April 2018. The liability judgment was that the Claimant had been unfairly dismissed and that there had been disability discrimination.

3. The respondent successfully appealed against the finding of discrimination. There was no appeal against the unfair dismissal decision. As a result of the Employment Appeal Tribunal's decision of 20 August 2019, the only remaining remedy issue for the employment tribunal to deal with was in relation to unfair dismissal.

4. As the parties were notified on 22 October 2020, EJ Henry was unavailable and REJ Foxwell made a decision that EJ Quill would take his place on the panel, alongside Ms Goldthorpe and Mr Bury.

The Hearing and the evidence

5. The Claimant attended in person and represented herself. She was accompanied by 2 relatives for support and assistance with transporting the documents. EJ Quill and Mr Bury were present in person in the hearing room. Ms Goldthorpe attended remotely by video (CVP). Mr Davies also attended remotely by video (CVP).

6. There were some slight technical issues with the CVP, but these were easily resolved and did not cause any delays to the hearing or prevent the panel and the parties from all being able to hear each other during all parts of the hearing.

7. We had the paper version of the original trial bundle in the hearing room (and the Claimant was able to refer to it as and when required), but the panel were not required to refer to it. All the relevant documents were in the remedy bundle. We had the remedy bundle from the respondent electronically (in 2 parts: 2 pdf documents of 164 pages each). We also had the 49 page remedy bundle from the Claimant electronically (one page was missing but there was a copy of that page in the Respondent's remedy bundle and the original liability bundle). Each side had the other's bundles, and the Claimant worked from paper versions.

8. The Claimant's remedy bundle (pages 1A and 1B) contained a statement which the Claimant had prepared for the remedy hearing. The Respondent was content for us to take that statement as read and did not require the Claimant to be cross-examined.

9. Mr Davies had prepared a written argument which the panel and the Claimant received before the hearing. During the hearing we heard oral arguments from each side and the panel sought clarification of each side's position. We then sent the parties out while we deliberated.

10. We had been told during oral arguments that the Respondent agreed with the Claimant's calculation of the basic award (subject to fact that the Respondent argued for a 10% reduction – see below). However, during our deliberations, we decided that the parties might be mistaken. On resumption of the hearing, we explained to both parties that the basic award should be calculated using gross figures for weekly pay, not net. Both parties and the panel agreed that, in order to calculate the Claimant's gross weekly pay at the time of dismissal, we should use the July 2016 payslip, and that we could include all the elements of remuneration on that payslip, and that – therefore – we would use the figure of £1771.82 as her gross monthly pay.

11. Our judgment and reasons as delivered originally did not make any mention of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 or discuss the possible uplift in the event of a breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Claimant drew this to our attention. We deliberated further and then informed the parties that we had decided that we would state expressly in the judgment that there was no uplift (for the reasons mentioned below).

12. The Claimant asked if there was a mechanism by which she could apply for the Respondent to pay her legal costs. We were provisionally willing to deal with a

costs application on the day. However, Mr Davies, who did not appear at the liability hearing, had no instructions on the issue and the Claimant had not brought any documentary evidence of the costs incurred. (From what she told us briefly, no invoices had been submitted to her, and she believes that fees were paid by relatives on her behalf). Therefore, having deliberated, we ordered that if the Claimant wishes to make an application for costs, she must do so in writing, setting out the full basis of her argument for why an award of costs might be appropriate, setting out the amount claimed, and, to the extent possible, supplying supporting evidence. She may make the application within 28 days of the date on which this judgment is sent to her; if all the supporting evidence is not available by then, she must still make the application on time, and send the supporting evidence later. To make the application, she must write to the tribunal (preferably by email) and with a copy to the Respondent's representative. The Respondent has 28 days from the date of the application (if any) in which to make comments or objections.

The liability decision

13. As noted in the liability reasons (paragraph 142): "*The claimant was given six weeks' notice of termination, effective from 27 May 2016; her last day of service with the respondent being 8 July 2016. The claimant was advised that she did not then need to attend for duty during this period*."

14. The individual who took the dismissal decision, on behalf of the Respondent, was Ms Cunningham. At paragraph 140, the panel made findings about her decision and, amongst other things, stated:

    14.1 *Ms Cunningham further acknowledged the Occupational Health Report in respect of the claimant's episodes of panic/anxiety being due to the claimant's perception of feeling "intimidated" by management and "unappreciated"* …

    14.2 … *it was Ms Cunningham's conclusion that, the actions of the service management were in compliance with the Sickness Absence and Monitoring Policy which had supported her, in that; return to work and attendance review meetings had been held, referrals to Occupational Health had been made on three occasions, and referrals to the Employee Assistant Programme for counselling had been made, giving consideration to paragraph 10.3 of the Sickness Absence and Monitoring Policy, as to the nature of the claimant's illness and likelihood of it recurring/continuing, the length of various absences* …

15. Paragraph 26 of the liability decision cited extracts from the Respondent's Sickness Absence and Monitoring Policy ("SAMP") (which was pp 95 to 106 of the liability hearing bundle and was also included in the Respondent's remedy bundle). The extract from 5.3.4 included the following:

> *Disability related absences should be taken in account when looking at an individual's absence record as part of absence monitoring. Some or all of disability related absences should be disregarded if doing so would be a reasonable adjustment for the employee, i.e. allowing someone regularly attending a clinic or hospital paid time to do so would be considered as a reasonable adjustment.*

16. At paragraph 188, the tribunal expressed the view that a reasonable adjustment would have been to ignore some or all the Claimant's disability related absence. The EAT's decision was that that was not a reasonable adjustment which the Respondent was required to make.

17. Paragraphs 191 to 195 deal with the tribunal's analysis of why the dismissal was unfair.

    17.1 The dismissal reason was capability.

    17.2 The Respondent carried out a reasonable investigation into the Claimant's ill-health.

    17.3 The Occupational Health reports set out clearly, and identified the claimant's ill health, such that the respondents were then fully aware of the claimant's health and prognosis.

    17.4 Ms Cunningham – on behalf of the Respondent - should have expressly acknowledged that some of the Claimant's absence was due to disability and specifically considered whether – as per paragraph 5.3.4 of SAMP – some or all of the disability related absence should be disregarded when deciding whether to dismiss the Claimant.

    17.5 The Respondent failed to consider redeployment (and failed to notify the Claimant of potential vacancies) for the whole of the notice period. This is a reference to the finding of fact (made at paragraph 144) that the Claimant was removed from the relevant process circa 1 June 2016.

18. Paragraphs 196 and 197 explained the decision that there would be a 10% reduction for contributory fault.

19. Paragraph 200 noted that the determination of issues for Polkey would be considered as part of the remedy hearing. This paragraph followed the comments made in:

    19.1 Paragraph 198, which stated: "*The tribunal, giving considerations to the principles established in Polkey v A E Dayton Services Limited [1987], finds that for the procedural failings as identified, on the claimant having stopped engaging with the redeployment process and not responding to Ms Sobers correspondence, had the claimant then been kept within the redeployment process for the duration of the notice period, on the evidence of the claimant that she was then not in a fit state to apply for jobs, such additional period would not have made a material difference, and for which her employment would then have terminated at the end of the notice period*".

    19.2 Paragraph 199, which referred to the need to consider what the outcome might have been if Ms Cunningham had expressly considered disregarding disability-related absence. This paragraph is a reference both to the fact that the tribunal had decided that (i) the Respondent had unfairly failed to follow its own procedures, and specifically paragraph 5.3.4 of SAMP and (ii) disregarding some or all the disability-related absence would have been a reasonable adjustment.

Our findings of fact at the remedy hearing

20. Since her unfair dismissal, the Claimant has generally been unable to look for work due to illness. With assistance from friends and family, she was able to make applications to TfL and LB Hackney but was not appointed to either vacancy. She has been receiving state benefits.

21. In the notice period for her unfair dismissal, 27 May 2016 to 8 July 2016, the Claimant was too ill to engage with any attempts to redeploy her to any other post within the Respondent's organisation.

22. By agreement, the Claimant's gross pay is to be treated as £1771.82 per calendar month. Multiplying by 12 and dividing by 52 gives a gross weekly equivalent of £408.88 per week.

23. We would also like to mention that we have no reason to doubt the Claimant's comments about how badly affected she was by the dismissal, and by the Respondent's treatment of her in general. However, injury to feelings was not an issue that we needed to determine and so we should also record – in fairness to the Respondent – that if injury to feelings had been an issue for this hearing, then it is possible that the Respondent's representative might have wished to question the Claimant and/or to make submissions to us about the point.

The law

24. S122(2) the Employment Rights Act 1996 states

> *Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

25. In relation to compensatory award, S123(6) states

> *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*

26. Section 123(1) provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

27. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

28. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.

28.1 In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.

28.2 In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).

28.3 If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

29. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process had been fair?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

30. The Respondent invited us to consider the EAT's decision in Granchester Construction Ltd v Attrill UKEAT/0327/12. We have done so.

30.1 In paragraph 26, the EAT notes: *we accept that the Tribunal's approach in looking at a reasonable employer rather than at the actual employer was in error and was likely to understate the extent of the deduction that fell to be made*.

30.2 In paragraph 27, when considering the approach to adjustments for contributory fault and/or Polkey, the EAT suggested a tribunal should: *consider what facts and matters the employer would probably have accepted for itself, reasonably, having carried out the investigation that would have been carried out had a proper procedure been followed*.

31. More generally, Attrill considers the approach to making adjustments when deductions to reflect both contributory fault and Polkey might be appropriate. If a tribunal provisionally decides on a percentage reduction to reflect contributory fault, then it is not necessarily an error for the tribunal to decide that applying that full percentage reduction to the compensatory award might not be just and equitable if a Polkey reduction (which takes account of the same conduct by the employee) is also being made. In other words, the tribunal might decide to make a smaller reduction for contributory fault than it might otherwise have made. However, in Attrill, the EAT noted that if the logic just described would not mean that the smaller reduction should be applied to both the basic award and the compensatory award if the Polkey reduction was applied only to the latter.

32. Mr Davies invited us to decide that a Polkey reduction could (and, in this case, should) be applied to the basic award. He relied, in particular, on the part of paragraph 19 of the EAT judgment which states (our emphasis):

> *The process of calculation of a compensatory award is potentially subject to a reduction to take account of the chance that there would have been no loss at all because a dismissal might have been effected which was fair. That reasoning is irrelevant where what is in issue is the basic award, which is not affected by the Polkey deduction* ***except in the exceptionally rare case where such a (fair) dismissal might have taken place virtually contemporaneously with the unfair dismissal which actually occurred****.*

33. The appropriate maximum amount for a week's pay for the 2016 dismissal was £479.

34. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). Section 207A(2) of that Act provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that —(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

Analysis and conclusions

35. The appropriate multiplier for the basic award is 8.5, as both sides agree, based on 6 years employment, 5 of which were after the Claimant's 41st birthday.

36. Since weekly gross pay was £408.88 (which is under the cap), the calculation for the basic award is 8.5 x £408.88 which is £3475.48.

37. For the reasons stated in paragraphs 196 and 197 of the liability reasons, and taking into account section 122 the Employment Rights Act 1996, we consider it appropriate to reduce the basic award by 10%. We reject Mr Davies's argument that we should also reduce the basic award to take account of his submissions in relation to Polkey. We are satisfied that it would not be just and equitable to make any further reduction to the basic award because of (in the words of section 122(2)) "any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given)".

38. In terms of the compensatory award for unfair dismissal, the Claimant invites us to make an award for alleged failure to pay holiday pay. However, that alleged loss is not one flowing from the unfair dismissal. The Respondent states in its dismissal letter that the Claimant does not need to attend work during the notice period and that any unused holiday will be deemed to have been taken during the notice period. Whether or not the Respondent had the contractual or statutory right to make such a decision is not something about which we should speculate on in the circumstances, including the fact that it is conceivable that the dispute could

potentially be resolved in another forum. It is sufficient to say that no claim for unpaid holiday pay was presented to the tribunal. Furthermore, the facts (if true) that the Respondent asserted the right to require the claimant to use all of her remaining holiday entitlement within the period after 27 May 2016 and before 8 July 2016, and asserted that it had no obligation to make any payment in lieu of holiday on termination, are not things that cause a financial loss from the unfair dismissal. Apart from the fact that the Respondent could have adopted a similar stance had there been a fair dismissal, it could have purported to tell her to take her leave at that time even in the absence of any dismissal. If the Respondent reviews the matter and decides that an error was made, and that the Claimant should not have been deemed to have taken her leave at that time, then that is a matter for the Respondent.

39. In terms of financial losses in consequence of the dismissal, we were satisfied that this was not a case where following a fair procedure would have delayed the dismissal, and that this was not a case that there was any chance that following a fair procedure would have produced an outcome other than dismissal.

40. There were two defects identified in the liability reasons as leading to the finding of unfair dismissal: the redeployment issue, and the section 5.3.4 of SAMP issue (failure to consider ignoring disability related absence).

41. We have taken account of what the liability reasons say at paragraph 140. The findings of fact make clear that Ms Cunningham believed that the Respondent had complied with SAMP. Paragraph 140 lists the things that Ms Cunningham decided had already been done to support the claimant and to consider alternatives to dismissal. We have also reminded ourselves of what the liability reasons say at (for example) paragraphs 188, 191 and 199.

42. The defect found was that Ms Cunningham failed to consider disregarding the disability-related absence and, in particular, that she failed to expressly take into account that (as per the second sentence of 5.3.4 SAMP) there was an obligation to consider whether such absences should be disregarded if doing so would be an unreasonable adjustment.

43. We have therefore considered what Ms Cunningham would have decided, on 27 May 2016, had she expressly asked herself that question. In doing so, we have taken account of the letter (see paragraph 141 of the liability reasons) notifying her of the dismissal, which was in the bundle for the liability hearing and both sides' bundles for the remedy hearing.

44. Given the EAT's decision that the Equality Act 2010 did not impose an obligation on the Respondent to ignore (as a reasonable adjustment) some or all of the disability-related absence, then we are assessing what Ms Cunningham would have decided on the assumption that she was satisfied that there was no Equality Act obligation to ignore the absences as a reasonable adjustment. (And we are satisfied that she would have reached that conclusion given her belied that the Respondent had complied with SAMP.) We do not have to make a binary decision (on the balance of probabilities, for example) that she either would, or would not, have dismissed the Claimant; rather we have to assess the chances of her making

the various decisions which were open to her and – if appropriate – ascribe some percentage likelihood to the different possible outcomes.

45. We note from the dismissal letter that the dates of, and the reasons for, 88 days absence were stated and that a large part of the absence had reasons such as "stress", "severe stress", "anxiety", "panic attack", "depression", etc. We are therefore satisfied that Ms Cunningham did take account of the reasons for the absence (as discussed in more detail in paragraph 140 of the liability reasons).

46. We think that if Ms Cunningham had expressly considered whether she should – because of section 5.3.4 SAMP or for any other reason – disregard any part of that absence, then it is 100% certain that she would have decided "no". As said in section 5.3.4 itself "*where the levels of absence become unacceptable managers will still initiate formal action in accordance with this procedure and advice is available from HR regarding what may be considered as unacceptable levels*". Our judgment is that it is certain that Ms Cunningham would still have regarded the level of absence as unacceptable even if she had expressly considered – and addressed in her letter – whether the disability-related absence should be ignored. It is clear from the letter (and, as per the findings of fact in paragraph 140 of the liability reasons) that she believed that the Respondent had already done everything that it could reasonably be expected to do to assist the Claimant with her attendance. She also noted in the letter that the Claimant had been invited to the meeting on two previous occasions, and had failed to attend, and failed to make written submissions. We do not think there is a chance that she would have – for example – deferred her decision to a later date, in order to give the Claimant a further opportunity to comment on which absences should be ignored. Similarly, we do not think that she would have deferred in order to get further information from Occupational Health (and see paragraph 192 of the liability reasons).

47. In relation to the other defect, the failure to keep the Claimant in the redeployment pool until the end of employment, this is already dealt with at paragraph 198 of the liability reasons. The tribunal has already made a decision that there would have been no difference to the termination date if (i) the Claimant was given notice by letter dated 27 May 2016 and (ii) such notice was due to terminate on 8 July 2016 and (iii) the Claimant had been kept in the redeployment pool until 8 July 2016.

48. That being said, given the contents of paragraph 200, and given the tribunal's obligations to do what is just and equitable when considering remedy, it would not necessarily have been too late for us to consider fresh evidence and arguments on the point. In fact, the Claimant confirmed to us that she agreed that she would not have been fit to engage in any redeployment exercise at the time and could not have considered/applied for potential vacancies even if they had been sent to her. It is also true that she had been in the redeployment pool between around 19 April 2016 and 1 June 2016. The engagement with that process is set out in the liability reasons. There is no reason to think that there would have been a successful outcome in the period 1 June 2016 to 8 July 2016, even if the efforts had continued. In other words, there is a 100% chance that employment would still have ended on 8 July 2016 even if the Respondent had not unfairly and unreasonably removed the Claimant from the redeployment pool circa 1 June.

49. The Claimant has not suffered any financial loss at all as a result of the *unfair* dismissal, because a fair dismissal would have taken place on 8 July 2016, even in the absence of the defects that led to the decision that the dismissal was unfair. Furthermore, not only has the unfair dismissal not been the cause of any loss of income, but the Claimant's loss of statutory rights is not caused by the unfair dismissal. There is a 100% chance that she would have lost those rights on 8 July 2016 even in the absence of the defects. The tribunal cannot award compensation for injury to feelings, given that the only issue we are considering is the finding of unfair dismissal. For these reasons, the compensatory award is zero.

50. Since the compensatory award is zero, even if any percentage uplift were applied, it would still be zero. However, no uplift is appropriate in any event.

51. No breach of the ACAS Code by the Respondent was identified in the liability reasons. The Claimant was formally invited to the meetings in writing and she was given the right of appeal. The Claimant was kept informed in writing as to the progress of the matter. She had the opportunity to give her views (either by attending meetings and/or in writing). The tribunal expressly found that the Respondent had conducted a reasonable investigation. Therefore, even on the assumption that the Code applied to the dismissal, there was no breach of it, and we did not need to invite submissions from Mr Davies as to whether the Code had any relevance to a capability dismissal. In her particulars of claim, the Claimant alleged a failure to follow the Code in relation to her grievance. A decision was given on 30 November 2015, and the allegation is that there was a failure to allow an appeal. In paragraphs 21 and 22, and 54 to 100, of the liability reasons, the tribunal notes the steps that the Respondent took to implement the grievance outcome and the steps which it took to involve the Claimant. There was no finding that the ACAS Code had been breached and no finding that the Claimant had been denied the opportunity to appeal against the grievance outcome. Furthermore, and in any event, the express finding was that the Claimant was dismissed for the reason of capability, and not because of a dispute about hours or rota. There is, therefore, no basis for an uplift either in relation to any alleged breach of the Code in relation to dismissals (there having been no breach of the Code) or to grievances (no breach having been demonstrated, but, in any event, there being no link between the hypothetical breach and the unfairness of the dismissal).

Employment Judge Quill

Date: 05 June 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

15 June 21

FOR EMPLOYMENT TRIBUNALS