



EMPLOYMENT TRIBUNALS

Claimant: Julia Sealby

Respondent: River Learning Trust (Gosford Hill School)

Heard at: via CVP

On: 26 and 27 April 2021

Before: Employment Judge Milner-Moore

Representation

Claimant: In person

Respondent: Ms S Garner

RESERVED REMEDY JUDGMENT

1. In respect of the successful claim for unfair dismissal the claimant is awarded compensation as follows:
 - a. a basic award of £2,228
 - b. a compensatory award of £25,673
2. No separate award is made in respect of the claim of wrongful dismissal.
3. The Employment Protection (Recoupment of Jobseeker's Allowance) Regulations 1996 do not apply to this award.

REASONS

1. This case had been listed before me for a two day hearing to determine liability and remedy issues arising from a claim of unfair and wrongful dismissal. I was able to hear the liability issues and give an oral judgment on the second day of the hearing. I was also able to hear evidence (from the claimant) and submissions (from both parties) on remedy but had to reserve my judgment on remedy as there was insufficient time to conclude matters. In my liability decision I found that the claimant was unfairly dismissed, that her dismissal was wrongful (in that it is admitted that she

received 11 days less notice that she was contractually entitled to and that no Polkey deduction, and no deduction for contributory conduct should be made.

2. In reaching my decision on remedy I had access to an updated schedule of loss from the claimant (page 46 of the bundle) and to the supporting documents referenced in the schedule. The schedule contains a narrative of the steps that the claimant has taken since her dismissal to reduce her loss of earnings and the claimant was cross examined by reference to the updated schedule and that narrative. In light of the evidence before me I made the following findings.

Facts

3. At the time of her dismissal, the claimant was devoting three days of each week to working for the respondent and two days each week to working in private practice as a therapist.
4. The claimant's November 2018 pay slip indicates that she was earning a gross monthly wage of £2,147 and net monthly pay of £1,433 from her employment with the respondent as at the date of her dismissal. Those monthly figures equate to a gross annual salary of £25,673, a gross weekly wage of £495 and a net weekly wage of £330. She was also entitled to membership of the respondent's career average pensions scheme. The November pay slip shows that that the monthly employer pension contributions under that scheme were made at a rate of 19.3% which amounted to £414 per month when the claimant was dismissed. The claimant was 44 at dismissal and had worked for the respondent for just over three years.
5. In the tax year 2018/2019 the claimant earned £16,333 before tax through her private practice as a therapist. I have calculated that her net annual earnings from private practice during this period were £13,752. Her average net weekly income for the period when she was devoting two days a week to her private practice was therefore £264.
6. The claimant earned £19,518 in salary from the respondent in the tax year 2018/2019. Had she not been dismissed in January 2019 she calculated that she would have earned £26,376 by the end of March 2019. (This figure is slightly higher than the annual earnings figure given above because it includes a period earlier in the year when the claimant was working 27 hours a week although by November 2018 she had reverted to 24 hours a week). A tax return for her actual combined employed and self-employed earnings for that year shows combined earnings of £35,851 (gross) and £30,186 net (after deduction of tax of £5,665).
7. After her dismissal by the respondent the claimant had expected to take up a post as a Counsellor at an Oxford College but the post was withdrawn. She therefore looked for other counsellor posts in the education sector. The claimant has childcare responsibilities which mean that she is not in a position to undertake a lengthy commute. The claimant also valued the balance that combining part time employment with self-employment offered. She had some income security through her employment but was able to earn higher hourly rates through self-employment. She wished therefore to

continue to work part time if she could. For several months after her employment ended she continue to restrict her counselling work to two days in the hope that she would find other part time employment for the remaining three days.

8. The claimant conducted job searches and identified two posts that she could potentially have applied for which would have enabled her to work as a school counsellor within a reasonable distance of her home. One was her old position with the respondent and the claimant did not feel able to apply for that given her perception that trust and confidence had broken down. The other was a full time position advertised at a lower salary than her former role. She would therefore have had to give up her private practice and accept that her overall earnings would be reduced.
9. After searching for other employment without success, by June 2019 the claimant formed the view that she was unlikely to find equivalent part time employment. She focussed on building up her private practice to be a full time business. The claimant took out a business loan so that she could rent premises. She undertook marketing and registered with various organisations that might be expected to refer clients to her. She undertook training so that she could improve her offer to clients. Although she focused on increasing her client base she also continued to look for paid employment.
10. During the tax year 2019/2020 the claimant earned £27,453 (gross) and £22,609 (net) per annum from her self employment. That translated to an average net weekly income of £434. The claimant has produced accounts referable to her earnings in 2020/2021 which show pre tax earnings of £28,173 which I estimate are likely to amount to net annual earnings of £22,978 and an average net weekly income of £438.
11. The respondent has suggested that the claimant has unreasonably failed to mitigate her losses in various respects. It was put to the claimant that she could have looked for roles outside the education sector. The claimant's evidence, which I accepted was that she had looked at other counselling roles but had focused on those in the education sector because that is where her experience lies, the claimant having worked in that sector since 2002. The claimant had sought to undertake some work for employee assistance programmes as part of her efforts to develop her self-employed business. Before qualifying as a therapist the claimant had worked as a teacher and the respondent suggested that she could have taken up teaching opportunities. The claimant's evidence, which I accepted, was that in order to resume teaching she would have had to do a return to teaching qualification. She did not therefore consider this a good option to mitigate her loss in the short term and also did not wish to undertake a career switch, having moved away from teaching in 2003.

Law

12. The tribunal's power to make a basic award is set out in section 119 of the Employment Rights Act 1996.

"119 (1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—

(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

(a) one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week’s pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty year”

13. Section 123 of the Employment Rights Act 1996 sets out the basis on which a Tribunal will make a compensatory award

“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.”

14. The decision in **Norton Tool v Tewson** [1972] ICR 501 sets out certain well known principles applicable to the determination of the appropriate level of compensatory award when applying the statutory test set out above:

- a. the burden of proof lies on the claimant;
- b. the object is to compensate but not to award a bonus;
- c. when considering the evidence concerning the losses claimed regard must be had to proportionality and the more informal nature of the Tribunal’s procedures; and
- d. loss should usually be evaluated by reference to the following headings: immediate loss of earnings and benefits (including pension) up to the date of the hearing, compensation for economic loss flowing from the manner of dismissal, future loss of earnings and benefits and loss of statutory rights.

15. Calculation of pensions loss will be undertaken by reference to the guidance “Employment Tribunals : Principles for Compensating Pension Loss”. The guidance sets out the two methods for assessing loss. The “simple” method (essentially adding up the employer’s pension contributions) is to be used in cases involving defined contribution pension schemes. The “complex” method is to be used in defined benefits schemes (including CARE schemes such as the respondent’s pension scheme). However, as the guidance makes clear, there will be cases where it is appropriate to use the simple method to assess the compensation even in a defined benefits case, for example, this will be appropriate where the application of the statutory cap would make using the complex method disproportionate.

16. The duty to mitigate applies to claimants in employment tribunal proceedings. As the decision in **Wilding v British Telecommunications Plc** 2002 ICR 1079 sets out certain principles which apply when considering whether there has been a failure to mitigate.

- a. The claimant is under a duty to make reasonable efforts to mitigate the losses flowing from dismissal and to do so unaffected by the hope of compensation;
- b. Where the employer wishes to argue that that there has been an unreasonable failure to mitigate the burden is on the employer to show this;
- c. It is not enough for the employer to show that the it would have been

reasonable for the claimant to do X or Y in order to mitigate loss, the employer must show that it was unreasonable for the claimant not to have done X or Y; and

- d. In assessing whether a claimant has behaved unreasonably the test is an objective one to be applied following consideration of all the evidence;

Conclusions

17. I heard oral closing submissions from both parties. I have not set out the detail of the submissions separately but have addressed the key points made when explaining the conclusions that I have reached.

Basic award:

18. The basic award in this case amounted to **£2,228** namely 3 (complete years' service) x 1.5 (the age factor) x £495 (the claimant's gross weekly wage at dismissal).

Compensatory award:

19. I had an updated schedule of loss from the claimant which set out her gross annual earnings from self-employment. I did not have a detailed accounting setting out how much of her self-employed earnings could be attributed to days when, but for the dismissal, the claimant would otherwise have been working for the respondent. However, the claimant's post dismissal self-employed earnings needed to be applied to mitigate the losses that she was claiming from the respondent and this needed to be done in a manner that was fair to both parties. There was a dispute between the parties as to how I should do this.

20. The claimant's approach was to assume that for each year following dismissal she would have had gross employed income of £27,453 and would have continued to earning £16,333 gross from her private practice (this is the 2018/2019 level of income) amounting to a combined total of £42,079. She maintained that no deduction of self-employment income should be made in the period January to March 2019 and that the appropriate measure of her loss in subsequent tax years was to deduct her actual gross earnings from the figure of £42,079. She maintained that her loss of earnings is likely to continue in to the future but did not argue for any particular period of future loss.

21. The respondent suggested that the appropriate method of measuring the claimant's loss of earnings would be to off-set in actual mitigation an amount equivalent to 3/5 of her actual earnings from self-employment in the years after her employment terminated, presumably on the basis that the claimant was now able to devote an additional three days to private practice. The respondent also maintained that no compensation should be awarded for future loss of earnings.

22. The respondent accepted that the 2018/2019 figure of £16,333 represented a reasonable guide to the claimant's potential earnings during two days of private practice but considered that the salary figure of £27,453 used by the claimant was inflated. The respondent contended that the claimant had behaved unreasonably in failing to take steps that could have mitigated her

losses more fully. The respondent maintained that the claimant could have asked for her old job back or taken the lower paid full time as a school counsellor. The respondent also contended that pension compensation should not be paid after June 2019 on the basis that from that point on the claimant had decided not to take up the other opportunities available to her. The respondent also maintained that the claimant could have looked outside the education sector for counselling work or gone back in to teaching. The respondent also suggested that the claimant's business might have been more profitable had she banded with an existing counselling practice rather than setting up on her own.

23. I did not consider that the claimant had behaved unreasonably in failing to apply for her old job when it was advertised. The respondent, despite the claimant's requesting this, had taken no steps to attempt to repair the working relationship (e.g. by attempting mediation). The respondent did not dispute that the role was also advertised at a lower salary. In those circumstances it was not unreasonable for the claimant to consider that applying for her old job was not an option. I also considered that it was not unreasonable for the claimant not to apply for the lower paid full time role. I considered that it was not unreasonable for the claimant to wish to replicate her current arrangements and to seek a part time role that would enable her to keep her private practice going at the same time and so to have a balance between job security and higher earnings from self-employment. I also considered that it was not unreasonable for the claimant to focus her job search on the education sector, after all that was where her qualifications and experience lay and so it was the sector in which she might expect the best chances of success with any application. I also considered that it was not unreasonable for the claimant to reject the possibility of a return to teaching given that the requirement that she would have had to requalify and that this would have meant moving away from her current profession. I also considered that it was not unreasonable for the claimant to delay seeking significantly to expand her self-employed business for a period. By June 2019, it had become clear that there was no immediate prospect of her obtaining employment as a counsellor in an educational setting. At that point, it was reasonable for the claimant to attempt to expand her private practice on the basis that this offered the best route towards mitigating her losses in the short term. There was absolutely no evidence to suggest that the claimant could have generated greater earnings by joining an existing counselling practice and I did not consider that the claimant had behaved unreasonably by setting up her own practice rather than joining an existing practice. I considered that, given that the claimant was still suffering loss of earnings at the date of the hearing it was unrealistic to suggest that there should be no compensation for future losses. However, I also considered that it would not be just and equitable for an extensive period of future loss to be awarded. I have therefore awarded compensation for future loss for a further period of 16 weeks on the basis that this will allow a period for the claimant to attempt to find employment, whether as a counsellor or in some other capacity, or to make further efforts to expand her private practice.

24. I reviewed the evidence regarding the amounts generated by the claimant through self-employment and considered how these amounts should be applied to reduce, in mitigation, her loss of employed earnings. I did not consider that the respondent's method represented a fair mechanism for

measuring loss. The claimant's evidence was that she had previously been able to fill two days with private practice clients but that she had struggled to find enough clients to keep her engaged full time. I considered that the respondent's approach would have the result of allocating as actual mitigation a proportion of the earnings that the claimant would always have generated during the two days in which she had previously dedicated to private practice. I considered that the better course was to deduct the claimant's net earnings from self-employment in 2018/2019 from her net earnings from self-employment in each subsequent year. This would generate a figure which showed the extent to which, through *additional* self-employed activity on days which would otherwise have been dedicated to working for the respondent, the claimant had been able to mitigate her loss of earnings from the respondent.

25. The total compensatory award is £37,986, to which the statutory cap is applied to reduce it to **£25,673**. That award is made up of immediate loss of earnings amounting to £33,897 and future loss of earnings for the 16 week period following the hearing of £4,089. A more detailed explanation of the manner in which this award has been calculated is set out below.

26. Immediate loss of earnings: £33,897

- a. 5 January - 6 April 2019 – 13 weeks x £330 = **£4,290**.
No earnings from self employment have been deducted as the claimant's self-employed earnings were attributable only to her ordinary 2 days a week private practice.
- b. Tax year 2019/2020 – 52 weeks x £330 = £17,160
£8,858¹ has been deducted reflecting claimant's mitigation through her self-employed activity during this period = **£8,302**
- c. 6 April 2020 - 27 April 2021 – 55.3 weeks x £330 = £18,249 from which £9,046² deducted reflecting claimant's mitigation through her self employed activity during this period = **£9,383**
- d. Pension loss calculated using the simple method - 120.6 weeks x £495 x 19.3% = **£11,522**.
- e. Statutory rights = **£400**.

27. Future loss of earnings: £4,089

- a. 28 April 2021 for 16 weeks x £330 = £5,280 from which £2,720 deducted³ reflecting the claimant's expected mitigation through her self-employed activity during this period = **£2,560**
- b. Pension loss calculated using the simple method - 16 weeks x £495 x 19.3% = **£1,529**

¹ Claimant's net earnings from self-employment during 2019/2020 were £22,610 from which £13,752 (net earnings from working two days a week in 2018/2019) has been deducted to generate a figure which reflects the extent to which the claimant was able to mitigate her losses through *additional* self-employed activity during 2019/2020.

² Claimant's net earnings from self-employment during 2020/2021 were £22,798 from which £13,752 (net earnings from working two days a week in 2018/2019) has been deducted to generate a figure which reflects the extent to which the claimant was able to mitigate her losses through *additional* self-employed activity during 2020/2021.

³ The annual mitigation figure of 2020/2021 of £9,383 generates a weekly figure of £170 (£9,383/55.3) and this has been used as an estimated figure for the claimant's likely mitigation during the period of future loss.

Wrongful dismissal

28. It is admitted by the respondent that the claimant received insufficient notice of dismissal by 11 days. The claimant was therefore wrongfully dismissed. However, the loss occasioned by the wrongful dismissal is covered by the compensatory award made for unfair dismissal and so no additional compensation has been awarded in respect of this complaint.

Employment Judge **Milner-Moore**

Date 17 June 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
18 June 21

FOR EMPLOYMENT TRIBUNALS