EMPLOYMENT TRIBUNALS

Claimant: Mrs S Loofe

Respondent: Tamicare Limited

HELD AT: Manchester **ON:** 23 March 2021

BEFORE: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: Ms L Quigley (Counsel)
Respondent: Ms Y Montaz (Consultant)

JUDGMENT having been sent to the parties on 26 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was successful with her claim of unfair dismissal. The Judgment was sent to the parties on 7 December 2020.

2. A remedy hearing was listed for 23 March 2021 before me to determine if the claimant was entitled to compensation in accordance with section 118 of the Employment Rights Act 1996.

Postponement application

3. At the outset of the hearing the respondent's representative made an application to postpone the hearing because she had only been instructed to represent the respondent the previous day and did not have access to the notes of evidence taken during the final hearing.

4. The respondent's representative submitted that she did not have sufficient information to put questions of conduct or make submissions on the "Polkey" point. The respondent's representative contended that without this information the respondent would not be able to pursue a defence of the remedy claim.

5. The claimant's representative opposed the respondent's application. The claimant's representative submitted that the respondent's representative worked for the same firm as the previous representative and all documents should be available. In addition, it was submitted that the claimant was dismissed in 2018 and any further delay would be unfair.

6. I refused to postpone the hearing. In accordance with rule 30A of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, when a party makes an application for postponement of a hearing less than seven days before the hearing, such a postponement will only be granted in exceptional circumstances.

7. I was not provided with details of exceptional circumstances to justify a postponement. The parties were notified of the remedy hearing on 19 January 2021. It is submitted that the respondent's previous representative was engaged on another hearing. It is likely that the previous representative would have had adequate notice of that hearing and should have sought alternative representation for the respondent once aware of the diary conflict. The claimant was dismissed in 2018 and in order to give effect to the overriding objective and in particular the requirement to avoid delay, I determined that the hearing should proceed.

Issues

8. The relevant legal issues were as follows:

   a) For the purposes of section 119 Employment Rights Act 1996:

      i) the period for which the claimant had been continuously employed;

      ii) the number of years of employment falling within that period; and

      iii) the appropriate rate of compensation for each year of employment.

      iv) would it be just and equitable to reduce the basic award as a result of the claimant's conduct?

   b) For the purposes of section 123 Employment Rights Act 1996:

      i) What loss has the claimant sustained in consequence of the dismissal?

      ii) Is that loss attributable to action taken by the respondent?

      iii) Has the claimant tried to mitigate her losses?

iv) Did the claimant cause or contribute to her dismissal?

v) If so, should any compensatory award be reduced?

vi) If so, what would be a just and equitable proportion?

vii) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

viii) Did the respondent unreasonably fail to comply with it?

ix) If so, is it just and equitable to increase any award payable to the claimant? By what proportion, up to 25%?

x) Does the statutory cap apply?

xi) What amount of compensation would be just and equitable in all the circumstances?

xii) Is the claimant entitled to compensation for loss of statutory right

Respondent's concession

9. Prior to hearing any evidence, the respondent conceded that the claimant was entitled to the basic award as calculated in her Schedule of Loss. I therefore determined that a basic award should be made of £6858.

Evidence

10. I heard evidence from the claimant and was referred to the Judgment of 1 December 2020, the claimant's updated Schedule of Loss, the final hearing bundle and a bundle the respondent's representative had prepared for use at this hearing. I also heard submissions from both representatives.

Relevant Legal Principles

11. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 of the Employment Rights Act 1996 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

12. The basic award is a mathematical formula determined by section 119. Under section 122(2) it can be reduced because of the employee's conduct:

> **"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."**

13. The compensatory award is primarily governed by section 123 as follows:

> **"(1) Subject to the provisions of this section and sections 124, 124A and 126 , 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….**
>
> **(6) 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……"**

14. Section 123(1) means that compensation can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer – see **Polkey v A E Dayton Services Limited [1988] ICR 142** and the subsequent guidance from the Employment Appeal Tribunal in **Software 2000 v Andrews & others [2007] ICR 825** (leaving aside that part of the guidance relating to the repealed statutory dispute resolution procedures).

15. The leading authority on section 123(6) remains the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. The Tribunal must be satisfied that the relevant action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

16. As to culpability, Brandon LJ said that:

> **"…it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."**

17. An unreasonable failure to follow the ACAS Code of Practice by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

18. Section 123(4) provides that when a Tribunal is ascertaining the claimant's loss it shall:

> **"apply the same rule concerning the duty of a person to mitigate this loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."**

19. In **Cooper Contracting Ltd v Lindsey 2016 ICR D3, EAT**, the Employment Appeals Tribunal gave guidance on the factors that should be considered when determining the issue of mitigation as follows:

- The burden of proof is upon the respondent to prove a failure to mitigate.
- If the respondent does not submit such evidence the Tribunal has no obligation to look for any evidence or draw inferences.
- The claimant must be proven to have acted unreasonably.

- The standard of what is expected of the claimant should not be too demanding.

- It is for the respondent to prove the claimant acted unreasonably in failing to mitigate

- Whether the claimant should have taken a better paid job, does not necessarily prove a failure to mitigate. This fact will be a consideration as to whether the claimant has acted unreasonably.

Relevant Findings of Fact

20. The claimant's net weekly basic pay when she worked for the respondent was £484 as agreed between the parties. It was also agreed that the claimant's contractual notice period was nine weeks.

21. The claimant's net weekly basic pay in her new employment from 12 March 2019 to 1 November 2020 was £424.50. The claimant's net weekly basic pay from 1 November 2020 is £277.90.

22. The first period of loss is from the date of the claimant's dismissal on 29 November 2018 to the 12 March 2019 - the date when the claimant secured new employment. The duration of this period is 14.5 weeks.

23. The second period of loss is from 12 March 2019 to the 1 November 2020, the date on which the claimant suffered a reduction in pay in her new employment. The duration of this period is 84 weeks.

24. The third period of loss is from 1 November 2020 to the date of the remedy hearing – 23 March 2021. The duration of this period is 20 weeks.

25. The monthly cost of the medical insurance was £207.93.

26. The respondent paid into the claimant's pension at the rate of £50.97 per week.

Submissions

<u>Respondent's submissions</u>

27. The respondent accepted the claimant mitigated her losses by gaining new employment. The respondent submitted that once the claimant's hours had been reduced in her new employment in November 2020, she should have looked for a new job with more hours and by failing to do so there had been a failure to mitigate her losses.

28. The respondent submitted that the claimant's medical insurance did not form part of her contractual entitlement. It is submitted that the medical insurance was a private arrangement paid by the claimant through the respondent.

29. The respondent accepted that there wasn't a full investigation but that an uplift of 25% is too draconian. It was submitted that this was the failure of an external

consultant that the respondent relied upon to do a proper investigation. The respondent contended that an uplift of 15% would be reasonable.

Claimant's submissions

30. The claimant submitted that the gross pay figure was agreed between the parties and conceded that the net pay figure was £484.

31. The schedule of loss omitted to include loss of pension contributions of 14.7 weeks at £50.97 = £748.82. It was agreed this loss ceased on new employment.

32. The claimant submitted that the only point pursued by the respondent was that of lack of mitigation. The points of contributory conduct and "Polkey" were abandoned. The claimant submitted that the onus was on the respondent to prove that the claimant had not mitigated her losses and has failed to do this.

33. It was submitted that the claimant has proven mitigation by making in excess of 200 job applications. It was contended that the respondent's submissions were not based on the reality of the employment world today.

34. It was submitted that the respondent had not proven that the claimant was not entitled to the medical insurance payment. The claimant contended that she was entitled to this payment from 2011.

35. The claimant submitted that the Tribunal found deficiencies in the procedure followed by the respondent and the uplift was justifiable. It was submitted that the respondent could not hide behind professional advisors and a 25% uplift reflected the serious breach.

36. The claimant maintained that she was entitled to 9 months future loss. It was submitted that the country remains in a pandemic and the claimant will struggle in the open market because of a lack of qualifications

Discussion and conclusions

Basic Award

37. The respondent conceded the basic award. I order the respondent to pay the claimant a basic award of £6,858.

Compensatory Award

28.11.18 – 12.3.19

38. The net loss for the first period is £7,018. There was no dispute between the parties that the duration of this first period of loss was 14.5 weeks or that the net weekly loss was £59.50.

12.3.19 – 1.11.20

39. The net loss for the second period is £4998. The respondent submitted that by June 2019 the claimant should have secured better paid work. It is submitted that

the claimant should not have settled for this job and she should have done more to earn a higher paid wage.

40. The claimant did as much as she could in the circumstances. I accept the claimant's evidence that she sought to obtain alternative employment after 12 March 2019. The respondent has not proven that the claimant did not do this. In addition, the claimant accepted her new job with a promise that her pay would be increased, and it was in January 2020.

41. I therefore determine that the claimant is entitled to the loss of wages for the full duration of 84 weeks at a rate of £59.50 per week.

1.11.20 – 23.3.21

42. The net loss for the third period is £4122. I accept the claimant's evidence that following the reduction in pay on 1 November 2020 she made approximately 30 applications for a new job. The claimant has a lack of qualifications and I also take judicial note of the current pandemic and the state of the job market. As a result, the claimant has been unable to secure higher paid alternative employment.

43. I therefore determine that the claimant is entitled to loss of wages for the full duration of 20 weeks at a rate of £206.10 per week.

Medical Insurance

44. It was part of the claimant's terms and conditions that the respondent funded the claimant's medical insurance. This payment was in lieu of a pay rise.

45. The respondent paid the claimant £207.93 each month. The payment was identified as medical insurance. The same amount was deducted from the claimant's gross pay each month. The description of that deduction was medical insurance.

46. The claimant has lost this benefit as a result of her dismissal and in accordance with section 123(2) of the Employment Rights Act 1996 is entitled to be compensated for this loss.

47. The duration of time from 29 November 2018 to 23 March 2021 is 27 months. The claimant is entitled to the loss of this benefit for the full duration of this period at the rate of £207.93 per month. The gross loss for this period is £5,614.11.

Pension loss

48. The claimant suffered loss of pension payments from 28 November 2018 – 12 March 2019 – a period of 14.5 weeks at a rate of £50.97 per week. I would expect the claimant to receive pension contributions from her new employer from 12 March 2019 and therefore the period of loss of pension payments is limited to 14.5 weeks.

49. The gross pension loss for that period is £739.07.

Future loss

50. I accept the claimant's evidence that she continues to struggle to find better paid work as a result of her lack of qualifications, the current pandemic and the state of the job market.

51. However, a number of restrictions are scheduled to be lifted on 12 April 2021/17 May 2021 and businesses will reopen creating more opportunities. The claimant still has a lack of qualifications and I anticipate it may take her some months to find better paid work. The net weekly loss is £206.10. The period of future loss is from 23 March 2021 – 23 December 2021 – a duration of 39.2 weeks. I therefore award the claimant net loss of £8079.12 for this period

52. I also award the loss of medical insurance payments for this period at a rate of £207.93 per month. The gross loss of medical insurance payments is £1,871.37.

Loss of statutory rights

53. I award £500 for a loss of statutory rights as the respondent has not provided any evidence to suggest the claimant could or would find better paid work sooner than anticipated. The claimant was dismissed for gross misconduct after nine years' service and has struggled to find employment. It is likely the claimant will have to leave her current employment to find better paid employment and will lose her accrued statutory rights on so doing.

ACAS uplift

54. The total compensatory award is £32,941.67. I also award a 25% ACAS uplift of £8235.41

55. I have considered the Judgment of 1 December 2020. I note at paragraph 61 that Mr Shtrosberg admitted during his evidence that he had no knowledge of the ACAS Code when he carried out the investigation.

56. At paragraph 62 I made findings on the procedural performance of the respondent. The claimant was not told she was attending an investigation meeting, and I found that the decision to suspend the claimant was predetermined.

57. I also found that the respondent had completed numerous investigation reports, a number of which were not shared with the claimant. There were private meetings between Mr Shtrosberg and Mr McCabe – who had been instructed to deal with the disciplinary hearing, and no transcript was disclosed to either the claimant or to the Tribunal to understand what had been discussed at those meetings.

58. Mr McCabe did not investigate the claimant's assertions before he reached the decision to dismiss the claimant, and I did not find that the appeal corrected the defects. Therefore, an uplift of 25% is warranted.

Claimant's conduct

59. I did not make any findings that the claimant's conduct had contributed to her dismissal. Whilst the claimant forgot to deduct some leave she had taken to care for

her terminally ill father, she did record that leave on the proper forms. I did not determine that this amounted to culpable conduct.

60. The respondent's representative was unable to highlight any findings of culpable conduct and did not put any further questions to the claimant.

61. I therefore determine that the respondent has not proven that the claimant's conduct contributed to her dismissal and no reduction should be made to the compensatory award.

Statutory cap

62. Section 124 of the Employment Rights Act 1996 limits a compensatory award to either the lower of the statutory cap as it was in 2018, or 52 weeks of gross pay for the claimant.

63. The statutory cap in 2018 was £83,682. The total of 52 weeks gross pay for the claimant was £34,101.60. The compensatory award is therefore capped at £34,101.60.

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Employment Judge Ainscough

Date: 1 July 2021

REASONS SENT TO THE PARTIES ON

5 July 2021

FOR THE TRIBUNAL OFFICE