EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Whitbread **Respondent: Homes2Inspire Ltd**

v

Heard at: VIA CVP **On: 11 May 2021**

Before: Employment Judge Milner-Moore

Appearances
For the Claimant: In person
For the Respondent: Mr Lovejoy (Solicitor)

RESERVED REMEDY JUDGMENT

1. The respondent is ordered to pay the claimant a Basic Award of £892.

2. The respondent is ordered to pay to the claimant a Compensatory Award of £13,106.

3. The Recoupment Regulations do not apply to this award; the claimant has not received a recoupable benefit.

RESERVED REASONS

Background

1. Following a hearing on 19 and 20 October 2020, I found that the claimant had been unfairly dismissed by the respondent and that the compensation awarded to the claimant should be uplifted by 25% (pursuant to section 207A TULRCA 1992) to reflect the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures. A three hour remedy hearing took place on 11 May 2021. I heard evidence from the claimant, I also received a remedy bundle of 133 pages, an updated schedule of loss, a small bundle of emails, evidence as to typical solicitor's fees, evidence as to HMRC fuel and mileage rates and an authority (Stuart Peters Ltd v Bell). The claimant's schedule of loss sought compensation in respect of the following categories of loss: loss of earnings in relation to the disparity between her earnings with the respondent and her earnings with her new employer, loss of earnings in relation to the claimant's inability to perform sleep in shifts, consequential financial losses relating to the

claimant's increased travel costs, loss of life insurance provided as part of the respondent's pension scheme, loss in relation to share options and loss of statutory rights. In addition the schedule of loss sought compensation for the costs of bringing the ET proceedings and the time spent by the claimant in representing herself and compensation for injury to feelings. On 7 June 2021, the claimant made an application for a preparation time order. That application was sent to me on 22 June 2021.

Facts

2. In light of the evidence before me, I made the following factual findings.

Claimant's earnings with the respondent

3. At the time of her dismissal on 31 October 2018 the claimant's basic pay was £23,192 gross, £446 per week gross and £369 per week net. The claimant was obliged to work for 40 hours per week. In addition, the claimant had routinely worked overtime including sleep in shifts at £30 per shift. The claimant's schedule asserts, and the respondent did not dispute, that she had worked an average of 9.5 sleep ins per month. Sleep in shifts at this rate would have generated an additional £3,420 in earnings per annum raising the claimant's annual gross pay to £26,612 (giving gross weekly pay of £512 and net weekly pay of £413). The respondent made a 6% pension contribution to the claimant's pension.

Claimant's new employment

4. On 6 November 2018, the claimant began employment with a new employer as a "Senior Care Worker" earning £10.50 an hour working 140 hours per month. I have calculated this to give rise to a gross weekly wage of £339 (£10.5 x140 hours per month xc12 month and divided by 52 weeks). That gross weekly wage gives a net weekly wage of approximately £296. On 25 January 2019, she was promoted to Team Leader and her hourly rate increased to £11.50 per hour. I have calculated this to give rise to a gross weekly wage of £371 and a net weekly wage of £318. On 6 July 2020, the claimant was promoted again to "Registered Manager" earning an annual salary of £36,000 (which amounts to a gross weekly wage of £692 and a net weekly wage of £541). From 6 July 2020, the claimant suffered no continuing loss of earnings because her wage as a Registered Manager exceeded her earnings with the respondent.

5. The claimant has been employed by the same organisation throughout since her dismissal. She feels supported in her new employment and has progressed well, having secured promotion on two occasions in the two and a half years since leaving the respondent's employment. Her new employment attracted employer's pension contributions of 6.5%. Although the claimant had, by the date of the remedy hearing, accrued more than two years' service she claims £500 for loss of statutory rights The claimant also includes a claim for financial loss in relation to

the loss of the opportunity to work sleep in shifts. The claimant's new employment did not offer sleep in shifts. However, the claimant also maintains that she would have been unable to work such shifts, even had they been available, due to her anxiety, which she attributed to the respondent's failure to support her in relation to the matters that resulted in her resignation.

Claimant's personal circumstances

6. The claimant's new employment was further away from her home so she had a longer journey to work. Between 6 November 2018 and February 2020, she was having to drive an extra 46 miles per week. The claimant moved out of her home in February 2020 and moved back in with her parents. She moved home partly in order to have the support of her parents and partly in order to save costs. As a result, the claimant still had a lengthier journey to work at her new employment than she had before. Between February 2020 and July 2020 she was driving an additional 43 miles per week. Between July 2020 (when her workplace changed on her obtaining promotion) and the date of the hearing she was driving an additional 44 miles per week. The claimant claims that she should be compensated at 45p per mile on the basis that this was the rate paid by the respondent in expense claims. The respondent disputes that this is an appropriate valuation, as it is derived from the HMRC mileage rate which is prepared for a different purpose. The rate of 45p a mile is the rate at which an employee may claim for the expense of business travel undertaken in her own car without it being treated as a taxable benefit. If a higher amount is paid, tax will be due. If a lower mileage rate is paid tax may be reclaimed. The respondent suggest that any increased travel expenses should be payable at a rate of 10p a mile. The claimant disputes this and considers that it is not simply a matter of fuel costs there is a costs referable to the increased wear and tear on her car. However, she placed no specific valuation on this.

7. The claimant's evidence was that her worsened mental health meant that she would not have been able to do "sleep in shifts" with her new employer, even had they been available. She attributed her anxiety about "sleep in shifts" to the failures on the respondent's part which had resulted in her resignation. The medical evidence shows that the claimant was signed off for a period in the run up to her resignation, having sought treatment from her GP in relation to stress at work and anxiety and depression. In the years after her dismissal, the claimant has required further support and treatment from her GP for anxiety and depression. There are some references in the medical notes to the claimant feeling anxious about the Tribunal proceedings. However, the GP notes show that her anxiety and depression at this time was caused by events in her personal life which were entirely unconnected with her employment.

Share options

8. The schedule of loss included an unquantified claim in respect of the loss of share options. After reviewing the documents in the bundle, I concluded that, in October

2017, the claimant had been awarded Share Options in respect of 75 shares in the respondent. These options were "*exercisable in the event of a sale before January 2018*". If the sale went ahead shareholders would receive payment for the shares which would be paid to them through the respondent's pay roll. The option would expire on 31 January 2018. The sale did proceed and a payslip dated 21 December 2017 shows that the claimant received payment for her share options of £540 in that month's pay. It is clear therefore that the claimant's share options had been paid out long before her dismissal.

Costs related to attendance at the Tribunal.

9. The schedule of loss also included a number of items related to the claimant's participation in the Tribunal process, including costs of calls, printing and the time spent by the claimant on representing herself. She also claimed for the costs of a holiday her enjoyment of which had been affected by the requirement to engage with the respondent in relation to the hearing.

Injury to feelings and interest and pre termination loss.

10. The claimant's schedule also includes a claim for injury to feelings (£9,500) and 8% interest. The claimant also included a claim for the difference between her normal pay and the SSP that she received in relation to the period of her sickness absence in the 6 weeks before her dismissal. The schedule of loss also includes a claim for the costs of her prescription medication for anxiety and depression in the period July 2018 to May 2021.

Law

11. 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"

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

"(1)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.

(2) The loss referred to in subsection (1) shall be taken to include-
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal"

13. The decision in Norton Tool v Tewson [1972] ICR 501 sets out the general principles applicable to the determination of the appropriate level of compensatory award: the burden of proof lies on the claimant; the object is to compensate but not to award a bonus; when considering the evidence of loss regard must be had to proportionality and the more informal nature of the Tribunal's procedures; and 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. Compensation for loss flowing from the manner of dismissal is compensation for *economic* loss flowing from the manner of dismissal and not compensation for injury to feelings, which is not available in unfair dismissal cases (Dunnachie v Kingston Upon Hull City Council [2004] I.R.L.R. 727). Economic loss caused by the manner of dismissal may include cases where the manner of dismissal has caused an illness which has impacted on a claimant's ability to seek work. Where an illness, such as depression, has impacted on an individual's ability to mitigate her loss a tribunal should consider whether the depression was caused solely by the manner of dismissal, or whether there were other concurrent causes, or whether the causative impact of the manner of dismissal was limited to a particular time period (Dignity Funerals Ltd v Bruce [2005] IRLR 189). Norton Tool also establishes the principle that, where an individual has been unfairly dismissed without notice, compensation should include full notice pay and without offsetting any wages from new employment which were earned during what would have been the notice period. That principle does not, however, apply to cases of constructive dismissal (Stuart

Peters Ltd v Bell [2009] ICR 1556). A constructively dismissed employee must give credit for earnings received during the notice period.

14. The costs of bringing an employment tribunal complaint are not recoverable as part of the compensatory award. They are recoverable only where the Tribunal exercises discretion to make a costs or preparation time order under the 2013 Rules of Procedure. Costs are not routinely awarded in the Employment Tribunal. The circumstances in which a costs or preparation time order can be made are set out in rule 76 of the Procedure rules.

> **76.**—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a)a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b)any claim or response had no reasonable prospect of success.
>
> (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.

Conclusions

Basic Award

15. The claimant had 2 years continuous service and was 27 when her employment terminated. Applying the formula at s119 Employment Rights Act 1996, her basic award is therefore £892 (£446 x 2).

Compensatory award

16. **Share options, Injury to feelings, pre termination loss of earnings**: The claimant is not entitled to compensation for loss of Share Options. She has suffered no loss; her share options having been bought out in December 2017. The claimant is not entitled to compensation for injury to feelings in connection with dismissal, or interest, under the Equality Act 2010. There is no discrimination complaint in this case and such compensation is not payable in respect of an unfair dismissal (Dunnachie). Nor is the claimant entitled to claim compensation for loss of earnings suffered as a result of the disparity between full pay and SSP during the period of sickness absence which occurred before the termination of her employment; such loss has not arisen "as a consequence of dismissal" and so cannot be compensated under section 123(1) of the Employment Rights Act 1996.

17. **Loss of earnings:** The claimant's loss of earnings came to an end on 6 July 2020 when she secured promotion to Registered Manager. After that date her new earnings outstripped her earnings with the respondent (even including an

allowance for sleep in shifts). In calculating the compensatory award I have therefore calculated the difference between what the claimant would have earned with the respondent and what she did earn through her new employment between her dismissal and 6 July 2020.

18. **Sleep in shifts and prescription charges:** I accepted the claimant's evidence that sleep in shifts were not available in her new employment. I noted that the claimant considered that she would not, in any event, have been able to perform such shifts because of the impacts of the respondent's treatment of her on her mental health. The respondent relied on this to argue that the claimant should receive no compensation for the loss of the opportunity to earn additional wages for sleep in shifts. The respondent maintained that any such loss was due to the claimant's health, that had she remained employed by the respondent she would in any event have been unable to perform such shifts and so any loss did not "arise as a consequence of dismissal". Accordingly, such loss fell outside the Tribunal's powers under section 123(1) of the Act.

19. I noted that the claimant did suffer ongoing anxiety and depression after dismissal. However, I have found that the *manner* of the claimant's dismissal was not the cause of the claimant's continuing anxiety and depression to any significant extent, or for any significant period. It is evident from the GP notes that unrelated matters concerning the claimant's personal life caused her depression and anxiety in the period between her dismissal and the remedy hearing. I did not, therefore, consider that the claimant has shown that her requirement for prescription medication was a consequence of her dismissal, or was caused by the actions of the respondent.

20. I also considered that, were it not for the events which gave rise to her constructive dismissal, the claimant would have been able to earn extra wages doing regular sleep in shifts with the respondent. The respondent's conduct before dismissal caused the claimant to suffer depression and anxiety and to be signed off for a short period. I considered it likely, nonetheless, that, had the claimant not been constructively dismissed, any anxiety about doing sleep in shifts would have resolved itself quickly and the claimant would have returned to performing such shifts for the respondent. However, in fact, the claimant was dismissed and such shifts are not available in her new employment. The financial loss relating to sleep in shifts therefore arises in consequence of the dismissal and can be attributed to her employer's actions in dismissing her. I considered that, despite the claimant's evidence to the contrary, had such shifts been available with her new employer, it is likely that she would have been able to perform them. Despite continuing to experience anxiety and depression due to events in her personal life, the claimant has done well in her new employment and has secured two promotions. I think it likely that, given her positive history with her new employer, the claimant would have agree to do sleep in shifts if these had been on offer with her new employer.

I have therefore included an allowance for sleep in shifts in the compensatory award by using the net weekly pay figure of £413 (see paragraph 5 above).

21. **Loss of statutory rights:** The respondent contends that the claimant should receive no compensation for loss of statutory rights because this is a payment intended to reflect the intangible loss of the benefit of statutory rights (such as the right to claim unfair dismissal or the right to a redundancy payment) for which accrued length of service is necessary and for which the employee will have to re qualify. The respondent makes the point that the claimant had already re qualified for those rights by the time of the remedy hearing, having been employed for over two years with her new employer. There is EAT authority (Wolf v Kingston upon Hull City Council UKEAT/0631/06/DA) to the effect that, even if an individual has qualified for statutory rights by the time a case is heard, an award for loss of statutory rights may still be appropriate to reflect the fact that, throughout the qualifying period, the individual will have been "at risk" of dismissal with no entitlement to compensation beyond notice pay. On that basis, I consider it just and equitable to make an award for loss of statutory rights but not to award the full £500 sought by the claimant. I consider that an award in the sum of £250 would be just and equitable to reflect the fact that, although the claimant has now qualified for statutory protections, there was a two year period in which she had no such protection.

22. **Pension:** No specific amount was claimed by way of pension loss but it was common ground that there was a difference difference between the defined contributions made by the respondent at 6% and those made by the claimant's new employer at 6.5%. I have used the "simple method" and have calculated the difference between the amount of pensions contributions that would have been made by the respondent in the period up to 6 July 2020 and the amount of contributions that were actually made by the new employer in that period. I have not included an element for the loss of life insurance, which was a feature of the respondent's scheme but was not provided under the claimant's new employment. There was no evidence before me as to the costs of obtaining a replacement policy and so basis for me to make any award in respect of the value of this benefit.

23. **Travel costs:** I considered that it would be just and equitable for the claimant to be compensated for any increased costs of travel to work up until the point at which she chose to move home to live with her parents. The claimant at that point moved still further from her workplace (rather than attempting to move closer). She did so to reduce her expenses and have the support of her parents. That is a perfectly sensible decision but it would not be just and equitable to compensate her for increased travel costs given that it was her decision to move further away and given that she will have benefited in other respects from reduced expenses. I have

therefore awarded increased travel costs for the 58 weeks during the period 6 November 2018 to February 2020. (There are 65 weeks in that period, from which I have deducted 7 weeks in relation to periods of annual leave during which the claimant would not have made the journey to work). I have awarded compensation using the HMRC mileage rate of 45p per mile on the basis that I did not have any detailed evidence as to the actual costs incurred by the claimant. I considered the HMRC mileage rate a reasonable rough and ready measure to use given that it is the milage rate at which HMRC have assessed as generating, on an average basis, no taxable benefit to the individual.

24. I have therefore calculated the compensatory award as follows:

	Subtotal	Total
Loss of net earnings from dismissal to 6 July 2020 – 87.7 weeks x £413 net per week	£36,220	
Loss of statutory rights	£250	
Travel Expenses 58 weeks x 46 miles x .45p	£1201	
Difference in pension contributions up to 6 July 2020 Employment with respondent – 6% x £446 x 87 weeks = £2,328 LESS Senior Care Worker – 6.5% x £339 x 11.5 = £253 Team Leader – 6.5% x £379 x 75.5 weeks = 1,848 Difference equals £227	£227	
		£37,898
LESS earnings through mitigation up to 6 July 2020.		
Senior Care Worker from 6 November 2018 to 25 January 2019 11.5 weeks x 296 net per week	-£3,404	
Team leader from 25 January 2019 to 5 July 2020 75.5 weeks x £318 net per week	-£24009	
		£10,485
25% uplift - £10,485 x 25% = £2,621	£2,621	
Total compensatory award		£13,106

Preparation time and costs/expenses referable to the hearing

25. On 7 June 2021, the claimant emailed the Tribunal making an application for a preparation time order. She did not, as the Tribunal's procedure rules require, copy her application to the respondent. Her application alleges that the respondent's representative had behaved inappropriately including: pressing her to respond to

correspondence despite knowing that she was on holiday, being rude to her in court and speaking to her as though she were a criminal, disagreeing about bundle contents, failing to copy her in to an application for a witness order in relation to one of the respondent's witnesses and emailing her late at night. The claimant did not put in evidence copies of any correspondence that she regarded as inappropriate. However, I had seen a reasonable sample of the correspondence between the parties before the liability hearing and I obviously observed the parties interactions during the hearing. I did not consider that the conduct of the respondent's solicitor, either in relation to correspondence, or during the hearing itself, was inappropriate. It was certainly not unreasonable, or such as would warrant the making of a preparation time order. The respondent was not required to put the claimant on notice of its application for a witness order. Sending emails late at night is not uncommon for a busy solicitor. Nor is it uncommon for solicitors or parties (where they are unrepresented) to have to deal with matters whilst on holiday in order to ensure that cases come to Tribunal properly prepared.

26. In short, I do not consider that this is a case in which it would be appropriate to make a preparation time order in the claimant's favour under rule 76 of the 2013 Procedure Rules. The respondent did not behave vexatiously, abusively, disruptively or otherwise unreasonably in the conduct of the proceedings. Although the respondent did not succeed in defending the claim, I do not consider that it can be said that the respondent's defence had no reasonable prospects of success. It follows therefore that the claimant is not entitled to an order in respect of the time spent preparing for the hearing, or copying, or other expenses referable to the hearing. There is additionally no basis on which any award could be made in relation to the claimant's loss of enjoyment of a holiday due to being conducted regarding the preparation of the Tribunal claim.

Employment Judge Milner-Moore

Dated 5 July 2021
Sent to the parties on: ..13 July 2021.
THY.....
For the Tribunals Office

Note:
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.