



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110945/2018

Hearing Held by Cloud Video Platform (CVP) on 18 February 2021

10

Employment Judge - A Strain

15

Ms L Reid

**Claimant
Represented by
Mr James Conley
Solicitor**

20

Bute House Limited

**Respondent
Not Present
Not Represented**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

30

- (1) the Claimant was unfairly dismissed by the Respondent;
- (2) the Claimant had a disability in terms of section 6 of the **Equality Act 2010**;
- (3) the Claimant was treated unfavourably by the Respondent because of something arising in consequence of the Claimant's disability under Section 15 of the **Equality Act 2010**;

(4) The Tribunal makes a total monetary award of **£21,357.44** in favour of the Claimant and orders the Respondent to pay her that amount.

Background

- 5 1. The Claimant was represented by Mr James Conley, Solicitor. She had presented claims of Unfair Dismissal under section 98 of the **Employment Rights Act 1996 (ERA 1996)** and Disability Discrimination (asserting that she had been subject to unfavourable treatment arising in consequence of the Claimant's disability under Section 15 of the **Equality Act 2010 (EA 2010)**. She sought a Basic Award, Compensation for Financial Loss, Compensation for Injury to Feelings, an uplift for a failure to follow the ACAS Codes of Practice and interest.
10
2. The Respondent was not represented and did not appear. The Respondent's Response had been struck out under Rule 37 on 18
15 September 2020. The Hearing accordingly proceeded on an undefended basis.
3. The Claimant had lodged a Bundle of Documents with the Tribunal. Witness Statements had been prepared and exchanged in advance of
20 the Hearing. It was agreed that these would form the witnesses' evidence in chief but could be supplemented at the Hearing.
4. The Claimant gave evidence on her own behalf.

Findings in Fact

5. Having heard the evidence of the Claimant and considered the documentary evidence before it the Tribunal made the following findings in fact:

- 5 5.1 The Respondent is a limited company which operates residential care homes. The Respondent operates from premises in Cumnock, Ayrshire.
- 5.2 The Claimant was employed by the Respondent from 17 March 2009 as an Activities Co-ordinator.
- 10 5.3 The Claimant suffers from inflammatory polyarthropathies (rheumatoid arthritis), which is a long term impairment having a substantial adverse effect on her ability to carry out day to day activities. In particular, the Claimant suffers from pain and stiffness in her hands, knees, feet and hips. She has dull aches and pain. She needs assistance with day to day activities such as dressing.
- 15 5.4 The Claimant has suffered from inflammatory polyarthropathies for 8 or 9 years.
- 20 5.5 The Claimant also suffers from bronchiectasis (recurrent chest infections). When she has flare up of her bronchiectasis she has to stop taking her medication for her rheumatoid arthritis (anti-inflammatory medication and pain killers) and take antibiotics. This results in the Claimant suffering from excruciating pain and she cannot perform day to day tasks. She has to rest and cannot leave her home. She needs assistance with cooking, anything that involves lifting, washing and getting up out of bed or a chair. Such flare ups last between 2-4 weeks during which time she cannot work. She experiences flare ups
- 25 approximately 11 times a year.
- 5.6 Medical Reports confirming the conditions that the Claimant suffers from, the symptoms and medication are produced (Productions 39, 40 and 41).

5.7 During a flare up the Claimant became so ill that she was unable to attend work from 12 May 2017. The Claimant submitted a sickness certificate to the Respondent dated 15 May 2017 (Production 31). This certified her as unfit for work due to inflammatory polyarthropathies until 12 June 2017.

5.8 The Respondent (Suman Joshi) wrote to the Claimant by letter of 6 June 2017 requesting that she attend a meeting at Bute House on 12 June 2017 (Production 32).

5.9 The Claimant called Suman Joshi on 8 June 2017 to enquire the reason for the meeting. She was told it was for a general "catch up" before she returned to work.

5.10 The Claimant attended the meeting on 12 June 2017 with Suman Joshi. She was told that she (the Claimant) was rarely at work and that she should go home and consider her options. The Claimant had reported for work that day. Due to the conduct of the meeting by Suman Joshi the Claimant was stunned and upset. She returned home in tears. She did not understand what Suman Joshi wanted her to do.

5.11 The Claimant contacted Suman Joshi by telephone after the meeting and was told that she would not be getting paid for the week commencing 12 June 2017.

5.12 The Claimant was signed off by her GP again on 12 June 2017 for a further 4 weeks (Production 33).

5.13 The Claimant wrote to Suman Joshi by letter of 14 June 2017 (Production 34) outlining her concerns, the impact the meeting had on her health and that she was confused. She sought clarity on whether she would be paid for the week commencing 12 June 2017 and what adjustments the Respondent would make for her to stay in employment. She concluded the letter by asking for it to be treated as a formal grievance.

5.14 The Claimant followed this letter up with another to Suman Joshi dated 15 June 2017 (Production 36). This letter detailed how upset and distressed she was and that she was consulting her GP.

5.15 The Claimant received no response to her letters of 14 and 15 June 2017. She called the home and tried to speak to Suman Joshi several times in the days following. She was told she was unavailable. The Claimant became more distressed, couldn't sleep and her condition deteriorated as a consequence.

5.16 The Claimant wrote a further letter dated 22 June 2017 (Production 37) asking why she had not received a response.

5.17 The Claimant received no further correspondence or contact from the Respondent until she received a letter dated 3 November 2017 from Suman Joshi (Production 46). This letter simply asked the Claimant to complete and return a DWP SSP Form.

5.18 In November 2017 the Claimant was suffering from depression in addition to her inflammatory polyarthropathies due to the Respondent's treatment. She was prescribed anti-depressants. She was not sleeping, stuck in her house and suffering financially.

5.19 The Claimant heard nothing further until she received a letter of 18 December 2017 from Suman Joshi (Production 52) informing her that her SSP expired on 29 November 2017.

5.20 The Claimant received her P45 through the post stating that her employment with the Respondent had terminated on 25 February 2018 (Production 54). She had no contact from the Respondent in connection with the termination of her employment. The P45 came out of the blue and had a devastating impact upon her. She felt like an absolute failure. She cried and was upset. She did not understand why her employment had been terminated. She felt embarrassed and worthless. Her depression and anxiety got worse as a consequence.

5.21 She received her final pay slip dated 5 March 2018 (Production 55). She was paid up until 31 March 2018 which was the effective date of termination of her employment.

5.22 The Claimant had been certified as unfit to work from 15 May 2017 until the termination of her employment.

5.23 The Claimant has not worked since the termination of her employment with the Respondent. She has not applied for alternative employment as she does not think that anyone will employ her and that "it would happen again". She has been fit for work since a few months after her employment was terminated. Since the pandemic she has been shielding due to her underlying health conditions.

5.24 The Claimant's Gross Annual Basic Pay during her employment was £11,440; Gross and Net Weekly Basic Pay was £220.

5.25 The Claimant's statutory minimum notice period was 9 weeks.

5.26 The Claimant's age at termination of employment was 37.

5.27 The Claimant received Employment Support Allowance at the rate of £110 per week from the termination of her employment on 31 March 2018 until the date of the Tribunal Hearing.

5.28 The Claimant's failure to apply for other employment since she was fit to return to work was unreasonable.

The Relevant Law

6. The Claimant asserts unfair dismissal and disability discrimination due to unfavourable treatment.

Unfair Dismissal

5 7. Section 94 of the Employment Rights Act 1996 (“the ERA”) provides for the right of an employee not to be unfairly dismissed by his employer.

Section 98(1) provides the following:-

10 *“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

- (a) the reason (or, if more than one, the principal reasons) for the dismissal, and*
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held.*
- 15

20

25

(2) *A reason falls within this subsection if it –*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

5 (b) *relates to the conduct of an employee,*

(c) *is that the employee was redundant, or*

(d) *or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part of his employer) of a duty or restriction imposed by or under an enactment.*

10

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

15 (a) *depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for*

dismissal of the employee, and

20 (b) *shall be determined in accordance with equity and the substantial merits of the case.”*

8. In terms of Section 98(1) it is for the employer to establish the reason for dismissal. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section 98(4).

25

9. The Tribunal should first examine the facts known to the employer at the time of the dismissal and ignore facts discovered later. The onus of proof is on the employer.
10. The Tribunal must then ask whether in all the circumstances the employer acted reasonably in treating that reason as a sufficient reason for dismissing the employee. The onus of proof is no longer on the employer at this stage. The matter is at large for determination by the Tribunal under section 98(4).

Failure to follow ACAS Code Procedure

11. A Tribunal may award an increase of up to 25% in Compensation if it considers that an Employer has failed to follow the ACAS Code of Practice under section 207A of ***Trade Union and Labour Relations (Consolidation) Act 1992***:

207A Effect of failure to comply with Code: adjustment of awards

- (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
- (2) If, in the case of 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) that 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%.

The uplift may be awarded where the claim concerns a matter to which a relevant Code of Practice applies. The case of ***Holmes v Qinetiq Ltd UKEAT/0206/15/BA*** provides guidance on the application of the uplift. The uplift will apply to situations where there has been a failure to follow the ACAS Code of Practice on disciplinary and grievance procedures. It does not apply to ill health dismissals.

Disability Discrimination

12. The starting point for a Tribunal is whether or not a Claimant has a qualifying disability under section 6 of the EA 2010. Section 6 provides:

Disability

5 (1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

- 10 13. The onus of proof of impairment is upon the Claimant on the balance of probabilities.

Long-term effect

14. Schedule 1 paragraph 2.(1) of the EA 2010 provides:

The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

15 (b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

Substantial Adverse Effect

15. Substantial means more than minor or trivial (***Goodwin v The Patent Office [1999] IRLR 4 EAT***). If an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur (Schedule 1, paragraph 2.(2) of EA 2010).
- 20

Normal day to day activities

16. The focus of the EA 2010 is things that the Claimant either cannot do or can only do with difficulty, rather than on the things the Claimant can do. The *Guidance on the Equality Act 2010* (published by the UK Government) states at page 34 “in general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”

Unfavourable Treatment

17. Section 15 of EA 2010 provides:
- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
- Unfavourable treatment can include dismissal.

Compensation

Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of section 15.

5 An award in discrimination cases can include:

i. Financial Loss

Such as past and future loss of earnings.

ii. Injury to Feelings

10 A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039)***.

15 Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

20

25

Mitigation of loss

A Claimant is under a duty to take reasonable steps to mitigate loss. The onus of proving that a Claimant has failed in the duty to mitigate is upon the employer.

5 The Tribunal can obtain guidance on the approach to be adopted from awards made under section 123 of ERA.

The case of ***Cooper Contracting Ltd v Lindsay [2016] ICR D3; UKEAT/0184/15/JOJ*** provides a valuable overview of the duty to mitigate loss. Langstaff, J summarises the law under nine (overlapping) principles (paragraph 16):

10 (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.

(2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of ***Tandem Bars Ltd v Pilloni UKEAT/0050/12***, Judgment in which was given on 15 21 May 2012. It follows from the principle - which itself follows from the cases I have already cited - that the decision in **Pilloni** itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence 20 as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

- (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).
- (4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).
- (5) What is reasonable or unreasonable is a matter of fact.
- (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
- (7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Eyfe and Potter LJ's observations in Wilding).
- (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
- (9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

In the case of *Glasgow City Council v Rayton* UKEATS/0005/07/MT at paragraph 14 the EAT quotes from *Savage v Saxena* [1998] ICR 357; [1998] IRLR 182 at paragraph 23. There it is said that a Tribunal is required to –

5 “(1) *identify what steps should have been taken by the applicant to mitigate his loss; (2) find the date upon which such steps would have produced an alternative income; (3) thereafter reduce the amount of compensation by the amount of income which would have been earned.*”

10 The recent EAT case of *Hakim v Scottish Trade Unions Congress* UKEATS/0047/19/SS is also of assistance.

Submissions

18. The Claimant’s Solicitor made submissions orally.

Discussion and Decision

Reason for dismissal

15 19. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that Claimant was dismissed.

20. The Respondent had not followed any process nor had it provided any reason for the dismissal.

20 21. On the basis of the evidence given by the Claimant the Tribunal accepted and found that the reason, or principal reason, for the termination of her employment was the Claimant’s absence from work due to her inflammatory polyarthropathies. This was not a potentially fair reason under section 98 and the dismissal was unfair.

22. The Tribunal noted that there had also been a complete lack of contact with the Claimant. The Claimant had been dismissed without any prior warning or notice. The first she was aware of the termination of her employment was the receipt of the P45 through the post.

5 23. The Tribunal concluded that, in all the circumstances, the termination of her employment in this manner was substantively and procedurally unfair.

Disability

10 24. The Tribunal considered whether or not the Claimant had a disability as defined in section 6 of EA 2010.

Impairment

25. The Tribunal considered and accepted the oral and documentary evidence produced by the Claimant (including the medical reports).

Long-term effect

15 26. The Claimant had suffered from inflammatory polyarthropathies for a period in excess of 8 years.

Substantial adverse effect on normal day to day activities

20 27. The Tribunal accepted the oral and documentary evidence produced by the Claimant (including the medical reports). The evidence clearly detailed the significant impact upon the Claimant when she had a “flare up”. She needed considerable assistance with normal day to day activities such as dressing herself, cooking, cleaning, washing herself, getting out of bed and even out of a chair. She could not leave her home. Whilst the condition was manageable outside of a flare up it was clearly
25 a recurrent condition.

28. The Tribunal concluded that the inflammatory polyarthropathies meant that the Claimant had a disability under section 6 of EA 2010.

Knowledge of Disability

29. The Tribunal considered whether or not the Respondent was aware of the Claimant's disability. The Claimant had the disability for a period of in excess of 8 years. It was recurrent and during flare ups she was absent from work. She provided certificates from her GP during the period of absence from 15 May 2017 until the termination of her employment. These certificates stated that the reason the Claimant was unfit for work was due to her disability. The Respondent was clearly aware of her disability during her period of absence commencing 15 May 2017 and at the time of termination of her employment.

Unfavourable Treatment

30. The Tribunal considered whether the Claimant had suffered unfavourable treatment because of something arising in consequence of her disability. The Tribunal considered that the unfavourable treatment commenced with the meeting on 12 June 2017, continued with how they treated (and ignored/failed to communicate with) her and ended with the termination of her employment on 31 March 2018. It was evident to the Tribunal that the Claimant had been dismissed because of her absence from work which arose as a consequence of her disability. This was unfavourable treatment. The Respondent had clearly discriminated against her.

Notice

31. The Claimant's employment had been terminated summarily, without notice. Given her length of service she was entitled to a minimum of 9 weeks notice pay.

Mitigation of loss

32. The Claimant had not sought to obtain alternative employment after being certified as fit to return to work a few months after her dismissal.
33. The Tribunal considered whether or not the Claimant had taken reasonable steps to mitigate her loss. The Tribunal considered **Cooper Contracting Ltd v Lindsay [2016] ICR D3; UKEAT/0184/15/JOJ; Glasgow City Council v Rayton UKEATS/0005/07/MT; Savage v Saxena [1998] ICR 357; [1998] IRLR 182** and the recent EAT case of **Hakim v Scottish Trade Unions Congress UKEATS/0047/19/SS**.
34. Whilst there was no evidence from the Respondent in this case the Tribunal did have evidence before it from the Claimant to the effect that she had not applied for alternative employment since the date of termination of her employment. Her explanation for this was that she thought no-one else would employ her and if she returned to work it would happen all over again.
35. Whilst the Tribunal accept the considerable negative impact that the dismissal and unfavourable treatment had upon the Claimant it considered that she had failed to mitigate her loss by not at least attempting to obtain alternative employment. She had acted unreasonably by not applying for alternative employment in the circumstances.

20

25

36. The Tribunal did not consider it was appropriate to apply a percentage reduction to any financial award. The Tribunal adopted the approach in **Rayton and Hakim v Scottish Trade Unions Congress UKEATS/0047/19/SS** at paragraph 18:

5 *“Although the cases above ask the tribunal to identify the “date” upon which he would have found employment, the tribunal should not strive for a false appearance of precision. The tribunal is entitled to use its judgement and fix a suitable point in time for the purpose of the calculation. In performing this exercise, it should be recalled that the burden of proof*
10 *is on the Respondents. It was for the Respondents to satisfy the tribunal that the Claimant’s steps were unreasonable. In the absence of satisfactory evidence, the claimant should no doubt get the benefit of the doubt. After making suitable findings the tribunal should then assess the differential loss.”*

15 37. The Tribunal exercised its judgement and found that the Claimant should have been able to obtain alternative employment at or around the same rate of pay she enjoyed with the Respondent within 3 months of having been certified as fit to work. It was accordingly, just and equitable to restrict the award of financial loss to that period.

20 *Injury to Feelings*

38. The Tribunal accepted the Claimant’s evidence that the treatment of her by the Respondent had led to considerable distress, anxiety and had caused depression. She had to be prescribed anti-depressants. It had caused her inflammatory polyarthropathies to worsen, occasioning flare
25 ups and rendering her unfit for work until several months after her dismissal. She had felt humiliated, worthless and suffered sleepless nights.

39. The impact of the discriminatory behaviour/unfavourable treatment on the Claimant had been considerable and over a period of time (12 June 2017 to 31 March 2018).

5 40. The Tribunal considered that an award at the lower end of the middle band in **Vento** was appropriate (taking into account **Simmons v Castle [2012] EWCA Civ 1039**).

41. The Tribunal make an award of £10,000 in respect of injury to feelings.

ACAS Uplift

10 42. There had been an abject failure by the Respondent to follow any process in the circumstances of this case. The Respondent had not engaged or communicated in any meaningful way with the Claimant. It appeared to the Tribunal that the conduct of the meeting on 12 June 2017 suggested that the Claimant's attendance at work was an issue. She "was rarely at work" and should go home to "consider her options". There was no reference to her "ill health" or "capability". There was no evidence from 15 the Respondent as to its reason(s) for terminating her employment when it did. The Tribunal considered that any termination arose from her absence from work and should have been dealt with in conformity with the ACAS Code of Practice Disciplinary Procedures.

20 43. Furthermore, the Tribunal considered that there had been a failure to follow the ACAS Code of Practice in relation to the grievance lodged by the Claimant on 14 June 2017.

Remedy

(a) Unfair Dismissal

Basic Award

- 5 44. The Tribunal calculated the Claimant's entitlement to a basic award as 9 x £220 = £1,980.

(b) ACAS Uplift

45. The Tribunal considered that in the complete absence of any process an uplift was appropriate in the circumstances.
- 10 46. The Tribunal award an uplift of 20%.

(c) Disability Discrimination/unfavourable treatment

Compensatory Award

i. Financial Loss

- 15 47. The Tribunal considered that the Claimant should receive an award in respect of her loss of earnings from the date of dismissal until 3 months after she was fit to return to work. The Tribunal accordingly consider it just and equitable to award loss of earnings from 31 March 2018 until 30 September 2018.
48. This was calculated as 26 weeks x £220 = £5,772
- 20 49. The Tribunal considered that the sum of £500 should be awarded in respect of loss of statutory rights.
50. The Tribunal deduct from this amount the Benefit received by her over the period from 31 March 2018 until 30 September 2018 which is 26 weeks x £110 = £2,860.

51. The net Financial Loss is £6,272 - £2,860 = £3,412

52. The Tribunal applied interest at the rate of 8% from 30 September 2018 up to the date of the Hearing – 871 days x (£3,412/365 x 8%) = £653.25.

ii. Injury to Feelings

5 53. The Tribunal make an award of £10,000 in respect of injury to feelings.

54. The Tribunal applied interest calculated from the midpoint of 12 June 2017 (the first instance of discrimination) and 31 March 2018 (the final instance of discrimination), that being 5 November 2017, at 8% (£800/365 = £2.19) x 1201 = £2,630.19.

10

Total Award

The Total Award is accordingly:

1. Basic Award - £1,980 = £1,980

2. Financial Loss - £3,412 plus 20% = £4,094

15 3. Interest on Financial Loss = £653.25

4. Injury to Feelings - £10,000 plus 20% = £12,000

5. Interest on Injury to Feelings Award = £2,630.19

Employment Judge: Alan Strain

20 Date of Judgment: 15 March 2021

Entered in register: 12 May 2021

and copied to parties

