



# EMPLOYMENT TRIBUNALS

**Claimant**

Mr M Finnerty

v

**Respondent**

St Mungo's Community Housing Association

**Heard at:** Bury St Edmunds (by CVP)

**On:** 6 August 2021

**Before:** Employment Judge KJ Palmer

**Appearances**

**For the Claimant:** In person.

**For the Respondent:** Mr McCombie (Counsel).

## JUDGMENT

Judgment pursuant to a remedy hearing further to a liability hearing which took place on 2 February 2021 this Tribunal makes the following awards:

**Damages due to wrongful dismissal** £5,727.00

**Unfair dismissal**

Basic Award £11,221.87

Compensatory Award £8,462.34

Grand Total £25,411.21

## REASONS

1. This matter came before me today as a remedy hearing pursuant to a full merits hearing which took place on 2 February 2021. At the conclusion of that hearing I gave judgment in favour of the claimant in both his claim in wrongful and unfair dismissal. I had before me today Mr McCombie of counsel who was instructed by the respondent and Mr Finnerty in person. I also had Cerys Duke HR Partner of the respondent and Julie Collins of the respondent who had provided a witness statement. I heard submissions

from Mr McCombie and from Mr Finnerty, and Mr McCombie also briefly cross examined Mr Finnerty who had provided a witness statement for this hearing. I had before me various documentation sent through in a large file by those representing the respondent, most particularly I had in front of me a bundle specific to this hearing. I was taken through much of that bundle by Mr McCombie and during the course of the hearing was able to familiarise myself with its contents.

2. Firstly might I say I did not have in front of me what one could describe as a schedule of loss that was drafted in the usual format that we would expect to see in a tribunal such as this. The claimant is unrepresented and had produced a schedule of loss some time ago which talked in terms of claims for injury to feelings and did not address the usual factors that are included in an award made pursuant to an unfair dismissal claim. I accept that the claimant is unrepresented and therefore in the interests of justice it is necessary for the Tribunal to assist claimants in these circumstances where possible.
3. There are a number of unusual features about this particular remedy hearing which merit some comment. That usually in a remedy hearing the parties are locked into arguments concerning whether the claimant pursuant to a dismissal has discharged the duty to mitigate their loss by seeking other work and often by the time we get to a remedy hearing employees who have been dismissed and successful in unfair dismissal claims have actually already obtained fresh work and are continuing to earn. In this case we have a slightly unusual situation in that the claimant is very clear in making it absolutely plain both in the documents in front of me and in the evidence which he has given this morning that he has no intention of seeking other work pursuant to his summary dismissal unfairly as it turns out on the 6 June 2019 which of course led to this tribunal. He says the reason for that is that he has become a full time carer for his elderly mother who at the time of his dismissal was nearing 90 years of age and who's health was in considerable decline. That situation has continued and her health continues to be in decline to the point where she requires a full time carer at the age that she is now which is 92. Mr Finnerty the claimant fulfils that role and is a full time carer and has no intention of seeking other work.
4. That brings an unusual flavour to consideration of the duty to mitigate. All claimants who are successful in both wrongful and unfair dismissal claims do have a duty to seek other work. They cannot simply sit back and put their feet up and expect losses to accrue for which they will then subsequently be compensated. It is a well-known feature of employment tribunals that we have to assess whether individuals have discharged that burden. It is also the case however on authority that that burden is not a particularly high bar and usually even attempts to find other work which have proved fruitless are sufficient to discharge that burden.
5. In this case of course no such attempts have been made so I have to consider very carefully when I think it would be likely that the claimant could have found work had he been looking. Mr McCombie very helpfully directed

me to parts of the bundle where evidence which is not disputed or refuted by the claimant was of the availability of variety of jobs working in the same housing sector that the claimant had worked in for the respondent prior to his unfair dismissal. In cross examination Mr McCombie asked the claimant about experience that he had gained over 23 years of working in a particular sector, 19 of which he worked with this respondent. It is evident that the claimant had obtained a pretty broad skill set and experience which perhaps would have enabled him to apply not only for roles in the same sector but also roles in other areas.

6. I therefore have to crystal ball gaze to an extent and try and assess from the evidence that is in front of me when I think it would have been likely that the claimant could have gained meaningful employment had he been seeking to do so. I have taken into account the fact that the dismissal and the events which occurred before it which led to the dismissal had a very deleterious effect on the claimant and in fact at the time of his dismissal he was off sick as a result of the stress that he had suffered during the incident which had led to the disciplinary process and his subsequent dismissal. I also have to take into account the fact that the claimant is now 63 years of age and that that might affect his prospects in the work place.
7. Taking into account the evidence before me I think it unlikely that the claimant would have found similarly remunerated employment until a period of some time thereafter and taking into account the fact that part of this claimant's claim relates to the notice period he would otherwise have received had he not been dismissed summarily I consider that a further 22.5 weeks after the expiry of his notice period is appropriate. That takes us up to the day a year before the full merits hearing of this matter. I therefore assess the period of loss in this case should run up to 2 February 2020.
8. I was also addressed by Mr McCombie on the issue of contributory fault under s.123 of the Employment Rights Act and in cases such as this we often have to look at contributory fault particularly where the dismissal that was subsequently found to be unfair was for misconduct reasons. In this respect I re-read my judgment and re-visited the CCTV footage. I reiterate the point that I made in my judgment that I think the CCTV footage is of limited use without the sound and I in my judgment I made it clear that I accepted Mr Finnerty's evidence on what happened during the incident because the CCTV footage alone without the sound does not give any true impression of the level of intimidation Mr Finnerty was being subjected to at the time from the resident. I do however say in the judgment that I do not think that Mr Finnerty was entirely blameless and therefore I must consider whether I apply an element of contributory fault which will reduce the basic award and the compensatory award in the unfair dismissal claim in these proceedings. Having very carefully considered it and re-read my judgment and listened carefully to Mr McCombie I do think an element of contributory fault is appropriate here and I therefore propose to reduce both the basic and compensatory awards in the claimant's unfair dismissal claim by 25%.

### Wrongful Dismissal

9. Turning therefore to the awards and dealing first of all with the wrongful dismissal award, that is essentially the failure of the respondent to give the claimant any notice, Mr McCombie agrees with me that even though at the time of his dismissal the claimant was only receiving sick pay it is clear from the legislation at s.86 and s.88 of the Employment Rights Act 1996 and it is commonly a matter of law that in such circumstances where there is a failure to pay the statutory notice then any claim for that statutory notice must be paid at the normal week's pay rather than at the rate of statutory sick pay that the claimant might have been in receipt of at the time of the dismissal. Therefore it is a fairly easy process for me to make the calculation based on 12 weeks' notice pay, based on the net pay of £423.92 a week multiplied by 12 which comes to £5,087.04.
10. There was also and this is agreed by Mr McCombie a loss of pension benefit of £53.33 per week and that multiplied by 12 comes to £639.96 so the total award for the wrongful dismissal claim in respect of which the claimant was successful is £5,727.

### Unfair Dismissal

11. Moving on therefore to the unfair dismissal claim and dealing first of all with the basic award, the calculations are also not in dispute and are before me and I am grateful for that. That the basic award has been calculated at £14,962.50 and I must apply to that the contributory element that I have assessed at 25% and that reduces that to £11,221.87.
12. Dealing then with the compensatory award there is one other aspect that I must deal with and that is the level of weekly pay and therefore loss suffered that I am going to assess in respect of the claimant. It is common ground that a claimant cannot have double recovery and therefore recover loss for the same period of time that he is being compensated for in a wrongful dismissal claim so therefore I must ignore the first 12 weeks post the dismissal and the compensatory award then will just run from the period after that through to the period I have assessed as being reasonable period in which it would have been difficult for him to find work that is up to 2<sup>nd</sup> February 2020 and I need to decide whether the weekly pay during that period of loss would be at statutory sick pay rates which is what the claimant was on at the date of dismissal or at the usual net weekly pay. I have considered this and I in my judgment find that the rate of weekly loss should be at the normal net weekly pay of £423.92. The reasoning behind this is that the claimant was off sick at the point when he was unfairly and wrongfully dismissed but he was off sick as a result of stress arising out of the incident in question which took place some time earlier, a couple of months before in fact. There is no evidence in front of that persuades me that he would still have been off sick until February 2020 and he should be compensated for the loss that he would have suffered between the end of that notice period and the 2<sup>nd</sup> February 2020. Now I have calculated that the 12 week period from the date of dismissal which is covered by his

wrongful dismissal claim would have expired on 29 August 2019 and therefore the period to be compensated by the unfair dismissal compensatory award runs from 30 August 2019 through to 2 February 2020 which I think is a reasonable period of time. That is 22.5 weeks so it is less than 6 months beyond the 12 weeks' notice and I think that is a reasonable period. I understand and accept that the hearing did not take place for another year but I am assessing the amount of loss up to 2 February 2020 as I consider that a reasonable period. So that is 22.5 weeks at £423.92, that comes to £9,538.20 and I have to apply the 25% contributory fault reduction to that and that comes to £7,153.65.

13. There is also the question of pension loss during that period and that is 22.5 weeks at £55.33 which comes to £1,244.92. I also apply the contributory fault element to that and that comes to £933.69.
14. Loss of statutory rights which has been put in his schedule of loss at £250 is much more commonly now assessed at £500 and I have to apply the contributory fault element to that, so that brings that down to £375.
15. So that is a total for the compensatory award running from 29 August 2019 through to the 2 February 2020 of £8,462.34 after the adjustment for contributory fault.
16. So taking the three figures in question and summarising:
  - 16.1 In the wrongful dismissal claim I make an award of £5,727.
  - 16.2 In the unfair dismissal claim that is broken down into two awards I award;
    - 16.2.1 a basic award of £11,221.87; and
    - 16.2.2 a compensatory award of £8,462.34.

Making a grand total payable to the claimant by the respondent of £25,411.21.

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Employment Judge KJ Palmer

Date: 19 August 2021

Sent to the parties on: .....

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For the Tribunal Office