



EMPLOYMENT TRIBUNALS

Claimant: Miss K Grimes

Respondent: Dezrez Services Limited

HELD AT: Leeds Employment Tribunal

ON: 16,17, 20, 21, 22 May
2019

15, 16, 17, 18
September 2020

25 September 2020
(panel deliberations)

7 October 2021
(remedy hearing)

BEFORE: Employment Judge Buckley
Mr Taj
Mr Dorman-Smith

REPRESENTATION:

Claimant: In person

Respondent: Mr Curtis (barrister)

RESERVED REMEDY JUDGMENT

The claimant's claims

1. The respondent shall pay the claimant the sum of **£21,308.27** for unfair dismissal. This is made up of a basic award of £2286 and a compensatory award of £19,022.27.
2. The Employment Protection (Recoupment of Benefits) Regulations 1996 may apply to this award.
3. For the purposes of regulation 4 of the Recoupment Regulations 1996:
 - 3.1. Total monetary award: £21,308.27

3.2. Prescribed element: £15,606.82

3.3. Prescribed period: 24 April 2018 to 3 August 2018

3.4. Excess of total monetary award over prescribed element: £5,701.45

4. There is no award for breach of contract (notice pay).

The respondent's counter-claims

5. The claimant shall pay the respondent the sum of **£1816.10** for breach of contract (expenses).

6. The claimant shall pay the respondent the sum of **£450.02** for breach of contract (monies owed).

7. The claimant shall pay the respondent the sum of **£3291.02** for breach of contract (damage to company property).

REASONS

1. Neither party called any witnesses at the remedy hearing. We read and took account of a bundle of documents.

Findings of fact

2. Most of the tribunal's findings of fact are set out in the liability judgment. Where any additional findings of fact were made on the basis of the remedy bundle, they are set out within in the conclusions on each issue below.

Conclusions

Unfair dismissal - £21,308.27

Basic award - £2286

3. The basic award is agreed by the parties to be **£2286.**

Compensatory award- £19,022.27

Loss of earnings including bonus/commission - £15,606.82

4. The claimant's loss of earnings is 14.6 weeks x net weekly loss of earnings.

5. We find that the appropriate net weekly amount is £1068.96.

6. We find that the method of calculation suggested by the respondent is a fair, albeit broad brush way of calculating the appropriate weekly amount. We accept that a more detailed approach would, in any event, be likely to produce a lower figure because of the significant bonus earned by the claimant in the first three years.
7. The figure is calculated on the basis of the claimant's net pay and commission/bonus received in the 3 full years before termination. The final part year is not used, because the claimant's earnings were artificially low due to her absence from work. This period covers almost the whole period of employment with the respondent.
8. The total net pay for the period from January 2015 to December 2017 as shown on the payslips is £163,742.65. We have added back into this the amount of £3015.48 which was deducted from the earnings for 9 months as tax for the company car/benefit in kind (because we have reduced the amount for loss of a company car to take account of the tax that would have been paid by the claimant). This produces a total of £166,758.13. There are 156 weeks in this period and therefore the weekly average is £1068.96.
9. The loss of earnings is $14.6 \times £1068.96 = \underline{\underline{£15,606.82}}$

Pension loss - £109.79

10. We accept that an appropriate way to calculate loss of pension in this case is to award the weekly employer contributions for the period of loss. The payslips show that the appropriate amount is £7.52 per week. The loss is therefore $14.6 \times £7.52 = \underline{\underline{£109.79}}$

Holiday pay - £1924.13

11. We accept that the claimant would have accrued holiday during the 14.6 weeks and this would have been payable on termination. The amount of holiday that she would have accrued during this period is 9 days. The amount payable is therefore £1068.96 divided by 5 and multiplied by 9 = **£1924.13**

Company car – £881.53

12. Subject the following, we find that the appropriate amount to reflect the loss of the benefit of the personal use of the company car is 50% of the average lease cost of the vehicle of that type (£10,300 per annum).
13. We accept the respondent's submission that there should be a reduction to reflect the fact that the claimant paid tax on a notional amount in her payslip to reflect the provision of the company car as a benefit in kind. If the claimant had remained in employment she would have continued to pay tax at this level on this benefit in kind. We accept that the award must be reduced by to reflect this.
14. The claimant states that the amount on her payslip to reflect the benefit in kind was artificially high because it related, in part, to an earlier period during which

the respondent had failed to make the arrangements to pay the tax. Given that there is no suggestion that this amount would have changed during the 14.6 weeks that the claimant would have remained in employment if she had not been fairly dismissed, we find that it is appropriate to use the full amount set out in each payslip. It is a cost that she would have had to bear if she had remained employed.

15. On this basis we accept the respondent's submissions that the appropriate calculation is as follows. The weekly amount the claimant was paying in tax for having the company car is 40% of the weekly equivalent of the notional amount that appears on her payslips. That is £77.32.
16. £10,300 divided by 52 = a weekly lease cost of £198.08. £198.08 - £77.32 = £120.76. £120.76 x 14.6 = £1763.05. This is reduced by 50% to reflect the claimant's personal use = **£881.53**

Loss of statutory rights- £500

17. The tribunal considered whether it was appropriate to make no award under this head, given its findings that the claimant would have been dismissed in any event at a later date.
18. We accept that there is appellate authority to the effect that if a percentage deduction is made under **Polkey** then that percentage deduction should be applied to the award for loss of statutory rights. This is not the position here. We have not made a percentage deduction.
19. In contrast, there is no specific finding to the same effect at appellate level where an award of loss of earnings is instead made for a fixed period. We do not consider that the EAT in **Puglia v James** [1996] IRLR 70 prevents us from making an award for loss of statutory rights in these circumstances. The EAT's finding was simply that it found no error of law in the tribunal's reasoning for its decision not to make an award in that case.
20. We have decided that it is appropriate to make an award for loss of statutory rights in this case. In deciding to make the award, we take note that this is an award of a token or conventional sum, rather than an accurate reflection of the amount of loss suffered. The sum is described as token or conventional because it is impossible to quantify such loss. The appellate courts have taken this view on the basis that the question of re-employment and the length of that re-employment is an uncertain and imponderable matter.
21. We take account of the fact that, for 14.6 weeks, the claimant was without her built up statutory protection from dismissal, as a result of her unfair dismissal. In those circumstances, and having regard to the loss sustained as a result of dismissal, we do not think it would just and equitable to refuse to make any award. Given the token or conventional amount of the award, which does not reflect the individual circumstances of each case, nor do we do think it is appropriate to make any reduction to the award.

22. On the above basis, we find that it is appropriate to make an award of the conventional amount for loss of statutory rights which in this tribunal's view is a sum of £500.
23. The schedule of loss claimed a 'long notice award' rather than loss of statutory rights, although it is clear from the narrative that this included the loss of statutory unfair dismissal rights. We do not accept that it is appropriate to award an additional amount for loss of accrued long notice. We are not persuaded on the evidence before us that the double contingency of the claimant getting an alternative job and being dismissed from that job before building up the same entitlement is sufficiently likely for us to make an additional award for loss of long notice.

Expenses incurred in seeking employment

24. There is no evidence before us that would enable us to make a finding that the claimant has incurred losses under this heading that she would not have incurred in any event when dismissed by reason of redundancy 14.6 weeks later. Indeed there is no evidence at all of any expenses incurred. In the circumstances we find that it is appropriate to make no award under this heading.

Unpaid wages when put on SSP

25. This loss does not flow from the dismissal and therefore we make no award under this heading.

Telephone use

26. In the light of the tribunal's findings in the liability judgement that the claimant was only entitled to claim back business calls, the claimant is not entitled to an award under this heading.

ACAS uplift

27. The findings upon which the claimant relies to justify an ACAS uplift are contained in a section of the judgment entitled "alternative findings". These findings were not the findings upon which the tribunal found that the claimant had been unfairly dismissed. In these circumstances and in the light of the wording of section 207A of the Trade Union and Labour Relations Consolidation Act 1992 (TULRCA), we do not have the power to make an uplift for failure to comply with an ACAS code of practice.

28. Section 207A provides:

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%.

29. The potentially relevant code of practice in this case is the ACAS Code of Practice on disciplinary and grievance procedures (“the Code”).
30. In our view the claim does not concern a matter to which the Code applies. The Code did not apply to the process which led to the outcome of dismissal as found by the Tribunal. The fact that the tribunal gave a view on what its alternative findings would have been does not, in our view, give us the power to apply an uplift to the award.

Total compensatory award

31. The total compensatory award is:

£15,606.82 + £109.79 + £1924.13 + £881.53 + £500 = **£19,022.27.**

Breach of contract (notice pay) – no award

32. To avoid double recovery we make no award for breach of contract (notice pay).

The respondent’s counter-claim - £5557.15

Breach of contract (expenses) - £1816.10

33. The claimant agrees that mileage expenses are owed in the sum of **£1816.10**

Breach of contract (monies owed) - £450.02

34. The tribunal found that the respondent was entitled to compensation for the apple keyboards, the iphone cover and the synology cloud server, which were not returned in breach of contract.
35. We accept that the best evidence before us as to the loss sustained by the respondent is the value of those items when purchased new. There is no evidence before us as to the price of a second hand replacement. The respondent claims for three apple keyboards at £79, £99 and £79 = £257. The purchase price of the synology cloud server was £163.25. The purchase price of the iphone cover was £29.92. The total award under this heading is **£450.03**

Breach of contract (damage to company property) - £3291.02

36. The tribunal found that the respondent was entitled to compensation for any items returned damaged and for the cost of repairs to the company car.
37. We assess the value of repairs to the company car at £2674.02.

38. We accept that the best evidence before us as to the loss sustained by the respondent by the damage to those items is the replacement value. The best evidence as to the replacement value before us is the value of those items when purchased new. There is no evidence before us as to the price of a second hand replacement or the cost of a repair. We assess the value of those items as follows:

Ipad - £459
2 x apple magic keyboards - £158

39. The award for those items returned damaged is £617. The total award for damage to company property including the cost of repairs to the car is £2674.02 + £617 = **£3291.02**

Employment Judge Buckley
Date 20 October 2021

JUDGMENT SENT TO THE PARTIES ON: 20 October 2021
FOR THE TRIBUNAL OFFICE: E Mahon

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