Case numbers: 2302095/2019
2302107/2019
2303310/2019

EMPLOYMENT TRIBUNALS

Claimants: Ms J Vidgen
Mrs H Hudson
Ms L Payne

Respondent: K2 Smiles Limited

Heard at: London South by CVP **On:** 12 August 2021

Before: Employment Judge N Walker (sitting alone)

Representation
Claimants: Mr A Wrigley, Friend
Respondent: Ms A Beattie, Litigation Manager

CORRECTED RESERVED JUDGMENT ON REMEDY

The Respondent must pay:

1 the First Claimant, Julia Vidgen, the amount of £25,970, which is a basic award of £6,678 and a compensatory award of £19,292.

2 the Second Claimant, Helen Hudson, the amount of £7,900.97, which is a basic award of £4,046 and a compensatory award of £3,854.97.

3 the Third Claimant, Laura Payne, the amount of £24,384.36, which is a basic award of £7,809.36 and a compensatory award of £16,575.

REASONS

1 Each of the three Claimants were found to have been unfairly dismissed. The parties have each prepared schedules of loss and counter schedules. I have taken each of the Claimant's awards in turn.

Julia Vidgen

2 Julia Vidgen was dismissed on 20 February 2019. At the date of dismissal, she was 47 years old and had completed 13 full year's work for her employer.

3 There was a dispute between the parties as to the correct weekly hours. The Respondent calculated the hours on the previous 12 completed weeks averaging out the total time. However, this employee had a contract which provided for her to work for 26 1/2 hours per week and in those circumstances, I concluded that section 221 applied. Accordingly, as the employee was employed at the rate of £14 per hour her weekly gross pay was £371. My calculation of the average net wage she earned was £316. The statutory cap is 52 times £371 = £19,292.

Basic Award

4 In the circumstances her basic award was 18 times £371 = £6,678.

Compensatory Award

5 There was a significant dispute about the Compensatory Award. The Claimant had been employed as a dental nurse. The Respondent had dismissed her on the basis of gross misconduct. The average rates for dental nurses were lower than the Claimant had earned. She had been given regular pay increases by Mr Wrigley when he was the employer. I am told that the Claimant did not anticipate being able to get a dental nursing role in the light of her dismissal and she therefore sought other forms of employment. In April 2019, she applied for and obtained position as a receptionist for which she was paid £8.21 per hour, subsequently increased in April 2021 to £8.91 per hour.

6 The Claimant was unemployed between 20 February 2019 and 8 April 2019 being seven weeks and her net loss for that period was £2,212.

7 Thereafter the Claimant worked slightly varying hours as a receptionist and her net monthly salary from that employment varied a little from time to time so that her monthly loss also varied. Additionally, she began to receive pension contributions.

8 On 28th April 2020 the Respondent closed the practice due to Covid. The Respondent argues that the Claimant would have been furloughed on 80% pay during that period. This continued until the until July 2020 when the practice resumed. Mr Wrigley for the Claimants argued that many dental practices remained open in order to carry out emergency work and that the Claimant would not have been furloughed, but I accept that if the Respondent's practice was closed and staff furloughed, the Claimant would also have accepted furlough and 80 per cent pay. As a result, she would have been paid 80% of her standard pay for that period.

9 I am told that the Claimant did not seek any benefits and accordingly there is no question of recoupment.

10 In the circumstances I assess the Claimant's monthly net loss as £1369.33, with a reduced sum for the furlough period. I must then deduct from that, the sums earned by the Claimant in her new role.

11 The Claimant had some pension loss. Mr Wrigley argued that she should have Christmas bonus but as recorded in the liability judgement, he wrote to the Respondent and told them it was discretionary. They did not pay a Christmas bonus. I do not regard it as something capable of amounting to a loss.

12 Each of the Claimants also claim general dental council fees, nursing indemnity fees and training fees but this Claimant did not incur these fees as she did not work as a nurse. I do not award any of these sums

13 There is a sum due by way of loss of statutory rights. I would ordinarily assess this sum for long standing employee as over £500 but the Respondent argues that for a part time employee on a lower rate of pay this should be a lower sum and after due consideration, I have concluded that such award should be £400.

14 I have to consider the question of future loss. The Claimant suggests that she should be compensated for loss of wages up to her likely retirement date. While there are cases which have allowed losses up to the date of retirement, it is my view that there is a strong chance the Claimant would have chosen a different option for her career before that time. Given the uncertainties of Covid, I doubt she would have considered changing her job until the situation settled but I do not think it is reasonable to consider losses beyond the end of 2022, that is a further 16 months.

15 Mr Wrigley for the Claimants argued that they would have received annual pay increases and he calculates their loss on an increased basis each year. However, he put in documentation showing the average salary for a dental nurse is significantly lower. In the light of that evidence, I cannot assume that the Respondent would have continued to increase the Claimants' salaries well above those which were standard in the industry. I have decided that no salary increases should be applied.

16 The Respondent has argued that each of the Claimants' losses should be reduced for contributory fault and has set out three reasons in support of their argument that the Claimant contributed to her dismissal. I do not accept any of them amount to contributory fault. The Respondent argues that the Claimant's failure to attend the Respondent's premises on 4 December with the CPD records would have averted the need for investigation meeting. However, as I explained at some length, that date was for a hearing at which the Claimant was threatened with summary dismissal, ostensibly for some other substantial reason but in actual fact due to an allegation of misconduct and in circumstances where she was refused her contractual right to be accompanied by her friend. She was also refused the right to have a colleague attend with her. Given the Respondent's breaches of contract she left to meeting. The Respondent eventually realised that it had been in the wrong to refuse to allow Mr Wrigley to attend with the Claimants. The Respondent also relies on the Claimant's failure to engage in that meeting. I found that refusal was due to the Respondent's breaches of contract and not unreasonable. Thereafter the Respondent relies upon the Claimant's failure to attend subsequent disciplinary hearings and an appeal hearing. I have set out at some length in the liability judgement the problems which arose and how the dismissal process was deeply flawed. I also set out my conclusion as to the reason for the dismissal. Taking everything into account, I conclude that there was no contributory fault.

17 The Claimant argues that the award should be uplifted for failure to follow the ACAS code. The Respondent argues that they did follow the code. I have given this careful thought and while I accept that the Respondent did follow the outline steps which are identified by ACAS, the Respondent did not follow one key point in the Code. Specifically, there was a failure to investigate to a reasonable level. The independent consultant relied on information provided by the Respondent's manager/owners without taking any statements from them. It was difficult to know precisely what correspondence the independent consultant actually reviewed, but it is clear that no account was taken of correspondence from the General Dental Council which stated that they were unconcerned about the historic CPD records being held by the Claimants' former employer and that there was no duty on the Respondent to audit those records. Mr Rudston appeared unaware that the manager/owners had the ability to verify that the training records had been completed as recorded with the General Dental Council. I noted in the liability judgement, the explanation given by Mr Rudston for his conclusion that the Claimants were at fault in not providing those records and his explanation that it was comparable with an HGV driver who did not produce his driving licence. I also noted in the liability judgment that that was incorrect. It derived from a lack of understanding of the General Dental Council's system. The flaws in the investigation continued as there is no reference in Mr Rudston's report, when he recommended dismissal, to the Claimant's explanation which was submitted in writing. The ACAS code requires the employer to establish the facts of each case. There should be an investigation. That is not merely an investigation into the alleged wrong-doers explanation but in this case into whether there was any wrongdoing at all. That did not happen. There was no investigation by the independent consultant into the actual requirements for the provision of the CPD records. Had that

happened they would have advised that there was no misconduct. There should also be an opportunity for the employee to set out their case. In this case the employees set out their case in writing. However, the independent consultant failed to consider their comments. I am satisfied that there were fundamental breaches of the ACAS code. In the circumstances an uplift is appropriate. I have decided that the impact of the breach was serious and that the award should be uplifted by 15%.

18 I have calculated the loss month by month taking the net lost earnings at £1,369.33 (reduced to 80 per cent of that sum during the closure of the practice and staff furlough) and deducting the sums received from alternative employment. I assessed the loss to 28 August as £11,017.30. I then assessed future loss at a further 16 months, which I have calculated at £320 per month (£320 being the average monthly net loss for the last twelve months actual net loss figures) amounting to £5120 making £16,137.30 and added the pension losses of £459,70 to the end of August 2021, and £392.96 future 16 months of pension loss plus the statutory loss of rights figure of £400, and then uplifted the total by 15 per cent which results in £19,998.45 which is a larger sum than the cap. Therefore, the compensatory award is for the statutory cap of £19,292.

19 Thus the total award is for £6,678 plus £16,432 amounting to £23,110.00

Helen Hudson

Basic Award

20 Similar considerations apply in the case of Helen Hudson. She was dismissed on 20 February 2019. She was aged 37 at the time and had worked for 19 complete years for the Respondent. Her gross weekly pay was £238 per week reflecting the contractual working time of 17 hours per week and her hourly rate of pay of £14.00 per hour. The statutory cap in her case is £52 times £238 = £12,376.

21 I have calculated the weekly pay based on her contract and hourly rate for the same reasons as I have explained above. Given her age and length and service, I calculate that the basic award is £4,046.

Compensatory Award

22 Helen Hudson commenced alternative employment on the 24th of April 2019. Again, after her dismissal she was concerned that she would not be able to find a dental nursing role, particularly due to the problems of a gross misconduct dismissal, so she looked for alternative employment and obtained a position as a care worker. She was unemployed between 20 February and 24th April which is 9 weeks at £231.52 net amounting to £2083.68 plus a pension loss of £15.66.

23 This Claimant obtained alternative employment, initially on a zero hour contract earning £9 per hour. I am told that her hourly rate has been increased to £10.08 per hour. She is now working a 40 hour week.

24 There are several contracts of employment for Ms Hudson in relation to her new employment in the remedy bundle. The first, was a zero hour contract and the rate of pay depended on whether it was normal weekly work or weekend work or so on. A second, signed on 11 September 2019 provides her with a 25 hour week on £12, 090 per annum, which I calculate means that she had £232.50 per week at a rate of £9.30 per hour. That was £5.50 per week less gross than she had been earning for working another 8 hours per week.

25 Subsequently a change to the contract was issued on 3 October 2019 which took effect from 7 October and increased her income to a pro rata amount of an annual salary of £20,571.20. Again, it provided for a 25 hour week.

26 The payslips show that the salary element of her pay was £1071.42 for a four week cycle or £267.85 per week for 25 hours and thus it paid £10.71 per hour.

27 In the course of the hearing, I had understood that this Claimant had to increase her hours to 40 hours per week in order to mitigate her loss. This was clearly not correct. Once she had done 22.5 hours per week, or 5.5 hours more than previously, she had mitigated her loss fully.

28 I was concerned during the hearing by the possibility that having to do 40 hours per week as against 17 previously was an extremely large amount of additional work in order earn sufficient income. I questioned whether a number of additional day's work should be taken as mitigation so as to wipe out the loss when the employee could have taken a separate job in those days and kept that money while she was employed. However, I consider that 5 1/2 hours additional time is not excessive. There is no principle of law that I cannot identify that the hours of work have to be exactly, or indeed largely the same as before. In the circumstances I am satisfied that this Claimant fully mitigated her loss in 2019.

29 The Respondent argues that the payslip for the period from 6 July to 2 August 2019 shows that the Claimant mitigated fully at that stage, as from that point on this Claimant earned more than she would have earned working for the Respondent. Looking at the payslips, I accept that is correct.

30 In the circumstances I assess the Claimant's loss up to the date of this hearing as follows:

(a) first 9 weeks = £2083.68 loss of salary plus pension loss of £15.66 = £2099.34
(b) The two weeks from 24 April to 10 May = 2 times net £231.50 = £463 - £129.50 earned = £333.50 loss of salary plus pension loss of £3.48 = £336.98
(c) Four weeks from 11 May to 7 June 2019 £926 loss of salary less £717.17 earned = £208.83 loss plus pension loss of £6.96 = £215.79

(d) Four weeks from 8 June to 5 July £926 less £632.92 = £293.08 loss of salary plus pension loss of £6.96 =
£300.04

(e) Totalling £2,952.15.

31 As before, I reject the claim for a Christmas bonus and general dental council fees, nursing indemnity fees and training fees.

32 There is a claim for free dental costs. I understand the Claimant did previously benefit from free dental treatment. However, there is only a loss if the Claimant incurred costs in getting treatment elsewhere. I do not have the invoice for the alternative treatment and cannot value this.

33 Additionally, there is a sum due by way of loss of statutory rights. That award should be £400.

34 In the circumstances the compensatory loss up to the date of the hearing is £3,352.15

35 There is no question of future loss.

36 The Respondent has argued that the Claimant's losses should be reduced for contributory fault and has set out four matters by which it is argued the Claimant contributed to her dismissal. Three of them are the same as were argued in relation to Ms Vidgen, In addition to the matters argued in relation to Ms Vidgen, the Respondent also argues that this Claimant left her work without permission on 4 December 2018. As explained before, I do not think the three arguments have any merit in them. In relation to the additional point, I addressed this in the liability judgement and explained that this Claimant left work for a short time in circumstances where she was distressed, and which were akin to sickness. The Claimant was clearly unfit to work at the time. Her departure was not a contributory factor in her unfair dismissal. I conclude that there was no contributory fault.

37 The Claimant argues that the award should be uplifted for failure to follow the ACAS code. The Respondent argues that they did follow the code. As explained above, I do consider that the Respondent breached the ACAS code and have included an uplift of 15% amounting to £502.82.

38 The total compensatory award is £3,854.97.

Laura Payne

39 Laura Payne was born on 5 October 1968. She commenced work on 1 January 1996. Her employment ended on 1 April 2019. She was aged 50 at the date of termination. She had worked 23 full years for the Respondent. Her hourly pay

was £15 and her gross weekly pay was £318.75 per week, for 21.25 hours. If she had remained employed, currently her net pay would be £284.66 according to the HMRC web site. The statutory cap in her case is 52 times £318.75 = £16,575.

Basic Award

40 The basic award is 24 1/2 weeks x £318.75 = £7,809.36.

Compensatory Award

41 Ms Payne began to look for other work after her employment ended but I understand that she could not find any other local work with similar hours, as a dental nurse. She then applied for jobs as an adult carer, though I have been provided with very little detail about that.

42 Ms Payne's husband was terminally ill throughout this time but managed to continue working until a short while before his death. I understand that he had a form of brain cancer and was not able to drive. According to a colleague his last day at work was 4 June 2021. His GP reports that he was in hospital in May 2021 for a while. Prior to that he appears to have continued coping remarkably, albeit with some physical difficulties.

43 The only time when the Claimant says she would have found it very difficult to work for the Respondent was between March and June 2021, as at other times, he didn't need constant care. While she was working for the Respondent, this Claimant was usually able to swap hours with other staff members in order to accommodate occasions when she was needed to help her husband. Having considered the written reports in the bundle form the Claimant's husband's GP and a work colleague I accept this evidence.

44 The position was different in terms of finding alternative employment. This Claimant could not expect the same support and flexibility from her work colleagues in new employment. She found it difficult to identify any employment which would have enabled her to work and provided her with the flexibility she needed to accommodate the requirements of her husband's illness. She was offered one job in October 2020, on a conditional basis subject to references and certain other information, but concluded that she would not be able to undertake this job, given her need for support and flexibility over her working time, due to her husband's condition.

45 On 20 June 2021, this Claimant's husband passed away. The Claimant still does not have another job.

46 There is an argument about whether this Claimant has adequately mitigated her loss, but I am conscious it is for the Respondent to prove that she has failed to do so Fyfe v Scientific Furnishing ltd [1989] IRLR 331. The Respondent has to show that the Claimant acted unreasonably. The approach was set out in

detail in the judgment of the Honourable Mr Justice Langstaff in Cooper Contracting Limited v Mr Lindsey UKEAT/0184/15/JOJ as follows

> *(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 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 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**, **Fyfe** 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.*

47 The Respondent did not show that the Claimant had acted unreasonably. There was no evidence of other jobs which the Claimant could have taken which would have been comparable or at least reasonable for her to take and that would have meant giving her some flexibility over her working time to accommodate her husband's illness, as she had been able to do before. While the Respondent says that there is very little evidence of an attempt to mitigate, no evidence of other available jobs which the Claimant might reasonably have been expected to try for was provided.

48 I do accept the Respondent's argument that the Claimant would have not been earning while she was caring for her husband and she agrees she couldn't work. It appears from the Claimant's evidence that it was for a period of three months between March and June this year. I cannot see that it was for any longer as her husband was working at times in May and the beginning of June 2021. I also consider that immediately after the Claimant's husband's death it would have been very difficult for the Claimant to have taken much action in the way of trying to find another job. Since the practice was closed during the first lockdown, I accept that this Claimant would have agreed to take 80% of her wages on furlough during that period. I also think that this Claimant would have remained with the Respondent for a considerable period of time as this had been a job she had held for a very long period and she had no experience of working elsewhere. Overall, I think it is right that she should be compensated until the end of 2022.

49 I do have to consider whether that loss would reduce by reason the Claimant's ability to get other work. I consider that she will be in a position to obtain alternative employment soon and knowing that she was previously able to get an offer of a job subject to some conditions, I can see no reason why she would not start some part time work by the beginning of October. I would envisage her circumstances to be similar to Ms Hudson and I would expect that she would be able to get a job working in the care sector, if not as a dental nurse. I recognise that having a family and being able get to work is a critical issue and I can understand that she would need to find a local job. Nevertheless, I think she would be able to earn £9 an hour as Ms Hudson did. I also consider she will be able to work similar hours to her previous work. In the circumstances I envisage an ongoing loss.

50 This Claimant would have been out of work for the period from 1 April 2019 to 30 September 2021, a total of 127 weeks. She would have been on furlough for 18 weeks. She would have been on compassionate leave and unpaid for 12 weeks. That means her loss is 109 weeks less 12 = 97 weeks at £284.66 per week totalling £27,612.02 and a further 18 weeks at £2298.60 (80%) totalling £4,099.10 equals £31,711.12. There are other loses and adjustments such as future loss, the statutory loss and the uplift, but it is clear that the total exceeds the statutory cap and so it is not necessary to go on to calculate any other such losses, including the loss of free dental treatment for which I do have some invoices. The compensatory loss is capped at £16,575.

Employment Judge N Walker
Dated: 23 October 2021