EMPLOYMENT TRIBUNALS

Claimant: **Ms A Lyon Shaw**

Respondent: **Royal Danish Embassy London**

Heard at: **London Central by CVP** **On:** **23 November 2021**

Before: **Employment Judge Walker**

Representation
Claimant: Ms N Mallick of Counsel
Respondent: Mr P Maratos, Consultant

JUDGMENT

The Judgement of the Tribunal is that the Respondent must pay the Claimant the total sum of £26,826.27 representing a Basic Award of £1076.00 and a Compensatory Award of £25,750.27 (subject to recoupment, if any).

Prescribed Element

The prescribed element is for the period from 1 January 2021 to the date of this hearing which is 23 November 2021 but the Claimant obtained work and fully mitigated her loss on 1 June 2021 so the losses have been calculated to that date.

The net weekly sum is £804.13 per week.

The actual losses ran for 21 weeks and 1 day.
The monetary loss was therefore £17,047.56

Non Prescribed Element

The Claimant's pension loss was loss of
a 5 percent contribution amounting to £3,911

The loss of statutory rights was assessed at £500

The ACAS uplift was assessed at 20 per cent
amounting to £4,291.71

Excess of award over Prescribed Element

The excess over the prescribed element was	£8,702.71
Total Compensatory Award	£25,750.27
Total Award (including basic and compensatory award)	£26,826.27

REASONS

1 This hearing was to consider the question of the remedy for the Claimant who had been found to have been unfairly dismissed in a judgement which was made in October after a hearing in September this year.

Facts

2 The Claimant was dismissed on the 31st of December 2020. She was told that she was going to be dismissed on the 8th of December 2020. She began searching for another job straight away. She got a new job and started on 1 June 2021. The Claimant received some monies from the DWP, but she informs me these have been fully repaid. In a spirit of cautiousness, I have followed the Recoupment Regulations, but in the Claimant's circumstances, these may no longer be relevant.

Undisputed aspects of the award

3 The Respondent does not dispute certain elements of the Claimant's schedule of loss in which she sets out what she believes to be her claim for a remedy. The Respondent concedes the Basic Award calculation is correct and the pension loss calculation is correct. The Respondent does not challenge the payment for loss of statutory rights in the sum of £500.

Dispute

4 There were three elements of the Claimant's schedule of loss which were disputed. The first dispute was over mitigation. The Claimant's schedule of loss showed her claiming her losses for the period between her dismissal and her getting a new job. The second dispute was whether the Claimant was entitled to a sum reflecting loss of a bonus as part of the compensatory award. The third was what the amount of the ACAS uplift should be under section 207A of the Trades Union and Labour Relations (Consolidation) Act 1992.

Mitigation

5 The Respondent disputes whether the Claimant made adequate efforts to mitigate her loss. The Claimant gave evidence about the efforts that she had made to find another job. She explained the approximate number of interviews that she

had been invited to as well the large number of job applications she had made and the fact that she had been close to getting two jobs but was only offered one. She took the first job she was offered.

6 The Respondent had no evidence at all to suggest there any other steps that the Claimant could have taken. The Claimant gave cogent evidence explaining that, given the Covid situation, all of this was dealt with online. She had provided a great deal of disclosure, some of which was in the original liability hearing bundle. The remainder of it was left out of the bundle because the Respondent's then representatives did not think it was of any value to have huge quantities of remedy documentation in that bundle.

7 The Respondent's argument that the Claimant has failed to mitigate adequately requires me to consider the appropriate approach. In the case of Cooper Contracting Limited v Lindsey 2016 ICR D3 EAT, Mr Justice Langstaff set out the approach and in particular it made it clear that the burden of proof, where there is an argument of failure to mitigate, lies on the wrongdoer - that is on the Respondent. If there is evidence as to mitigation, it has to be put before the Tribunal by the wrongdoer. The Tribunal itself has no obligation to look for that or draw inferences. In this case there is nothing from the Respondent to prove the Claimant has failed to mitigate. As I have noted, the Claimant's bundle included some of her evidence and I accept her statement that the Respondent's previous solicitors did not ask for more to go in the bundle but there was a great deal more.

8 Following the case law, there is no basis for the Respondent to argue that the Claimant has failed to mitigate. Moreover, on the evidence and in practice I am satisfied that, given the constraints at the time, the Claimant finding another job as she did in six months, was not a failure to mitigate. She worked hard at it and made a suitable effort to do so. She was entitled to look for a job at the same level for a reasonable period of time and that is precisely what she did. In all the circumstances, I make no deduction for failure to mitigate.

Bonus

9 Another question that I have to address is whether the Claimant is entitled to some compensation for loss of a bonus. The Claimant explained that she believed she was entitled to £2,000 pounds for each year she worked. The contract does not make a reference to bonus and there is nothing that I can find in the index to the Terms and Conditions which refers to a bonus. Rather the Claimant says other staff members told her that they did generally get a bonus. There is no claim for a historic bonus in the Claimant's ET1 and so I have no jurisdiction as to the previous year. The Claimant's Counsel argues that she should have got a bonus at the end of 2020 when she was dismissed, and so that a sum of £2,000 is properly part of her unfair dismissal compensation, but as I have noted there is nothing in the contract and the Claimant says she only knows about it because other staff told her. I take the fact that the Claimant wasn't paid any bonus in the previous year as indicating the Respondent took the approach that the Claimant was not entitled to a bonus and therefore that is not a loss flowing from her dismissal. To the extent that there may have been other claims which the Claimant could have made, perhaps under the Fixed Term employee protection legislation, it was not claimed as such. I conclude that I have no jurisdiction to make no award for loss of bonus.

ACAS Uplift

10 The final issue was the question of the ACAS uplift. The Claimant seeks a 25% uplift, which is the maximum uplift that a tribunal is entitled to make under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992. The parties both made submissions. The Respondent's submission really boils down to saying that any failure to follow a procedure was an inadvertent mistake. The Respondent says the situation boarded on being the end of a contract due to redundancy, but the Respondent had fallen into a dismissal unknowingly so that under the circumstances it wasn't a real breach, and they weren't taking a cavalier approach. While the Respondent accepted that some of uplift was appropriate it argued that the uplift should be limited to 10%.

11 The Claimant's submissions are effectively about the degree of failure. The Claimant argued it was a very serious failure. I was referred to various paragraphs of the judgement in which I had addressed the reason for dismissal.

12 In the judgment I recorded my conclusion about the reason for dismissal. I concluded that the dismissal was for poor performance. I took the view it was not a redundancy because the work continued. I referred to the Beard case where I said even if there was some kind of re-organisation there should have been a fair procedure. Although I considered all potential options, my finding was that this was a dismissal for poor performance and in paragraph 102 of my judgement I said there should have been a procedure. There was in fact none.

13 I also addressed the matter again in the initial reserved remedy judgment which I was asked to do by the parties on Polkey. I explained at that time that because of a lack of procedure it was not possible to make a Polkey reduction because there was no level of investigation to find out what the reason was for the alleged poor performance and no opportunity for the Claimant to remedy her performance, if it was thought that she was not meeting the expectations of the Respondent.

14 I have to consider the proper approach towards an uplift. In the case of Kuehne and Nagel Limited v Cosgrove EAT 0165/13 Her Honour Judge Eady explained that the first question is whether the failure was unreasonable. There is then case law which predates section 207A, but is still considered relevant. In particular the case of Lawless v Print Plus suggests that I should look at whether the failure of procedure was effectively deliberate or inadvertent. I bear in mind the Respondent's submissions that they fell into it and did not knowingly fail to follow a procedure, but I cannot agree that their submissions accurately characterise the conclusions I reached.

15 My judgement makes clear that the position was that funding for the role had not ended. There was continued funding for a digital expert carrying out this work in London. That was known by colleagues in other jurisdictions and must have been known to the Respondent at the time when they decided to recruit. I recorded in my judgement how the Respondent had a degree of latitude about how they achieved various objectives. In this case, they decided to recruit a new digital commerce expert with a minimal change of emphasis, and indeed invited the Claimant to apply, but then ignored her application entirely and took no steps to interview her. They did not follow any kind of poor performance process.

16 Overall, I have to conclude that Respondent's approach was unreasonable. That then triggers the question of an uplift and the question then is how much should that uplift be and what would be just and equitable. I cannot agree with the Respondent's submission that this was an inadvertent failure. There was no evidence as I have said that the situation on funding required a change. There was new funding in place. There was no evidence that the change of strategy required different people. There was a job specification for an advert prepared by Mr Ranieri Svendsen which was very much like the Claimant's original position. In the course of his giving evidence, I recall Mr Ranieri Svendsen expressing some surprise that there was any requirement for procedure on the ending of a fixed term contract.

17 I accept that this was not cavalier behaviour as such, but it is clear the Respondent failed to take steps to understand their obligations to the Claimant and, in consequence failed to carry out any procedure at all. In the circumstances I believe that this merits an award at the higher end of what I am able to do.

18 I have given some careful consideration as to whether it should be the maximum award of 25 percent. I am conscious that on the one hand there was no procedure at all. On the other hand, having looked at it in the round and considered everything, it is my conclusion that a just and equitable uplift which reflects the serious nature of the failures, but also reflects the overall situation is that the uplift should be 20%.

Employment Judge N Walker

Date 29 November 2021

JUDGMENT SENT TO THE PARTIES ON

29/11/2021

FOR THE TRIBUNAL OFFICE