Case Numbers: 2302095/2019
2302107/2019
2303310/2019

EMPLOYMENT TRIBUNALS

Claimants: Ms Vidgen
Mrs H Hudson
Ms L Payne

Respondent: K2 Smiles Limited

UPON APPLICATION made by letter dated 7 October 2021 to reconsider the Remedy Judgment dated 24 September 2021 under rule 71 of the Employment Tribunals Rules of Procedure 2013, and the parties having agreed that this should be reconsidered without a hearing.

REMEDY JUDGMENT

The Respondent is ordered to pay the Second Claimant, Helen Hudson, the amount of £8,673.85 which is a Basic Award of £4046 and a Compensatory Award of £4,627.85

REASONS

1 The Second Claimant applied for reconsideration on a number of different grounds. After consideration of the application, some of the basis for the reconsideration application were refused. I wrote to the parties in accordance with Rule 72 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, in relation to those parts of the reconsideration application which I considered might be varied seeking a response to those aspects of the application and seeking the views of the parties on whether those aspects of the application could be determined without a hearing. Both parties requested that the matter be considered without it a hearing.

2 In accordance with rule 72(2) having decided there would be no hearing, it was necessary for the parties to be given a reasonable opportunity to make further written representations and I therefore instructed the Tribunal to write to the

parties to this effect. There was some delay in that letter being sent out. I am now satisfied that I have received all written representations that are required and both parties have agreed to the matter proceeding without a hearing. In the light of that I have proceeded to reconsider the judgement.

3 The reconsideration related to two matters. First there was the question of the Second Claimant's hourly rate. It was clear from the reconsideration application that I had incorrectly calculated it. The second matter was the question of the ACAS uplift. I have taken each of these points in turn. References to the Claimant in this judgment are to the Second Claimant.

4 I have taken into account all the matters which were raised by the Claimant's representative and the Respondent's representative.

Hourly Rate

5 The Claimant's application was to review the Claimant's compensatory award because the hourly rate had been incorrectly calculated on a four-week basis rather than a monthly payment and consequent upon that I had incorrectly calculated the number of hours required to be worked beyond those worked while employed by the Respondent. The number of hours worked had formed the basis of my conclusion that the additional number of hours were acceptable and thus all the Claimant's earnings from such work fell to be considered as part of the Claimant's mitigation. The hourly rate error meant that the number of additional hours and the assessment of whether those all fell to be considered as appropriate mitigation had to be reconsidered. All of these matters fall within the ambit of the reconsideration of the hourly rate calculation.

6 The Claimant's hourly rate with the Respondent when she was dismissed was £14.00 per hour. The statutory cap is therefore £12,376. Her net weekly pay was £231.52.

7 While employed by the Respondent, the Claimant only worked 17 hours per week, in the week. She did not work weekends or Bank Holidays.

8 The Claimant was unemployed between 20 February and 24 April which is 9 weeks at £231.52 net amounting to £2083.68 plus a pension loss of £15.66.

9 The Claimant commenced alternative employment on 24 April 2019. Her work as a care worker was paid less than her previous work. Initially she was on a zero hours contract earning £9 per hour for normal weekly hours with higher rates of pay for Saturdays, Sundays and Bank holidays. However, the rate of pay changed. In the payslip dated 5 July 2019 the normal rate for hours of work between Monday to Friday is shown as £9.18. Higher rates were paid for unsocial hours such as weekends and bank holidays.

10 Thereafter the Claimant signed a new contract dated 11 September 2019 and then a third dated 3 October 2019. In the payslip dated 28 October 2019, there

is a figure for salary as well as the hourly rate, so the salary had come into effect by that stage.

11 Between 24 April and 7 June 2019, the rate of pay was £9 per hour and then between 8 June and 6 October 2019, the rate of pay was £9.18 per hour.

12 From 7 October 2019, the calculation I made of the Second Claimant's hourly rate in her new work was based on an assumption that she was paid on a four weekly basis, which was incorrect for that time. The payslips up to 28 September 2019 were all specified to be for a four weekly payment period. Thereafter, the calculation of the Claimant's hourly rate of pay should have been the gross annualised salary of £20,571.20 divided by 52 and then by the standard 40 hours, multiplied by 25 (being the hours worked by the Claimant) and thus £9.89 per hour. This is confirmed by her later payslips which show her salary as £1071.42 for a full month.

13 The Claimant's representative urged me to calculate her losses by reference to an assumed salary increase from the Respondent which the Claimant says was paid to another staff member who remained employed, but I was shown documentation about average salaries for dental nurses by the Claimants and, given those figures, I took the view that there would have been no increase and I am not reviewing that element of my decision.

14 In consequence the Second Claimant earned £9.00 per hour at first and then £9.18 and then £9.89 instead of £14.00 per hour.

15 The Respondent's comments are limited to saying that it is clear that I have incorrectly calculated the hourly rate at a point but given that I have concluded that the Claimant had fully mitigated by 6 July 2019, reconsidering the hourly rate will not affect the outcome of the judgment as even with an adjusted hourly rate, the Claimant continues to be paid more than she would have been had she continued to work for the Respondent.

16 However, as I have noted, the error raised by the Claimant is that my calculation of the number of hours worked by the Claimant was based on the hourly rate which was wrong and thus the assessment of the number of hours worked was also wrong. It is therefore necessary to recalculate the sums earned by the Claimant, and the number of hours which the Claimant worked, and reconsider if those hours are such that it was not appropriate to conclude that the Claimant had fully mitigated her loss when I determined that she had.

The Law

17 Section 123 (1) of the Employment Rights Act 1996 provides:

Subject to the provisions of this section and sections 124, 124 A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss

sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

18 Section 123(4) provides:

In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales.

Conclusion

19 As noted, the payslips processed on 2 August 2019, 28 September 2019 and 28 October 2019 all show the Claimant worked Mon- Friday hours at £9.18 per hour. She got a higher sum per hour for weekend work and for bank holidays. On 7 October the Claimant went onto a salary earning £9.89 per hour.

20 I have considered the argument about the hourly rate afresh and considered the pay slips in detail. The reason that I concluded the Claimant had fully mitigated by 6 July 2019 was that she did earn more than she had previously, but I erroneously thought this was because her hourly rate increased, and she only worked a few more hours. On reviewing the payslips, I note that in fact the increase at that time was due to a considerable amount of weekend work and also work on bank holidays. My assessment regarding her actual hourly pay and her hours was incorrect. I had not noted that a number of hours were unsocial hours for which she received a higher rate of pay.

21 The Claimant only worked 17 hours per week previously, all during normal weekdays. Her case is that the number of hours she had to work in order to earn as much as before was excessive and should not all be taken into account. In relation to that question, and how to assess the mitigation reasonably and fairly, I have concluded that I should not limit the hours to the exact same number of hours, which I think is the Claimant's case, but I do consider that I should ignore weekend and bank holiday work. While employed by the Respondent, the Claimant only worked in the week and not at weekends or on Bank Holidays. Her normal work was limited to two days per week. She may have assisted her colleagues by taking shifts from them if they were unable to work on occasions as I was told by her co-Claimant, Laura Payne, that her colleagues did assist her, but again this was in the week. She was free to undertake other different work on other days, and free at weekends.

22 The pay slip for 2 August 2019 shows 89.75 hours Mon to Friday at £9.18 per hour which resulted in the Claimant earning £823.91 gross. There was no tax deducted. In the same four week period had she remained employed she would have worked 68 hours and earned £231.52 net times 4 equals £926.08. Her loss was £102.17.

23 I do not have a payslip processed on 30 August 2019 and cannot calculate the loss precisely but based on an average of the two surrounding months, I calculate it was approximately £164.49 plus pension loss of £6.96 = £171.45.

24 The payslip for 28 September 2019 is also for a four week period. That payslip shows the Claimant worked for 76.50 hours in the Monday to Friday period at £9.18 per hour earning £702.27. Again, no tax was paid. In the same four week period had she remained employed she would have worked 68 hours and earned £926.08. Her loss is £926.08 less £702.27 equals £223.81.

25 The pay slip for 28 October shows the Claimant earned £1170.45 for the Monday to Friday period at 9.18 per hour. She also started earning a salary.

26 For the period when the Claimant was earning £9.18 per hour, she had to work for 25.93 hours per week to reach the same level of gross earnings as she did previously when she worked 17 hours (i.e. approximately 9 hours more).

27 There is a contract signed on 11 September 2019 under which the Claimant was to earn £12,090 per year for 25 hours per week which should work out at £9,30 per hour but I can find no pay slip showing that sum being paid per hour. Very soon after there is another contract which was signed on 7 October 2019. Under that contract the Claimant began to earn £9.89 per hour and its terms came into effect on 7 October 2019. At that stage the Claimant had to work for 24.06 hours per week rather than 17 hours (i.e. approximately 7 hours more), to earn the same amount. After 7 October 2019, she was earning as much as before working those longer hours. She had previously worked an 8.5 hour day with one hour unpaid for lunch. The pay slip dated 28 October 2019 shows the Claimant worked 127.5 hours at £9.18 per hour and also earned a part salary of £535.71. There was a pension paid. I cannot discern any actual loss.

28 From 7 October 2019 the Claimant should have been earning £9.89 per hour so that she had to work an additional 7 hours to fully mitigate her loss which she did.

29 In summary, having reviewed the hourly rate and, in consequence, the number of hours worked, I partially accept the Claimant's argument that the extra hours she had to work were so excessive that her earnings for these hours should not be counted towards her mitigation. I do consider that in assessing mitigation, I should not consider weekend or bank holiday work as the Claimant never previously worked at weekends or on bank holidays.

30 I cannot find any authority for the proposition that I should discount the week-day hours. It is certainly not the law that every hour should be addressed in this way. While there must come a time when the hours worked would be excessive and should not all count towards mitigation, and I believe I have some discretion, given the provisions of the Employment Rights Act, I am bound by the common law with regard to mitigation. I do not find it possible to say that the number of hours extra worked in this case during the week are so great that they should be disregarded for the purposes of mitigation.

31 In all the circumstances, having reviewed the hourly rates and ignoring weekend work and bank holidays, I conclude that my previous assessment was not correct, but the Claimant did fully mitigate her loss from 7 October 2019.

ACAS Uplift

32 The Claimant argues that this uplift had been determined during the hearing and that it was an error to use the lower figure of 15 per cent in the reserved judgment.

33 In the course of the discussion during the remedy hearing, I debated applying a 20% uplift and I recognise the Claimant may have believed this had been determined. In practice, as it was not possible to reach a final conclusion during the hearing on all matters, the entire judgment was reserved. I went through each issue, including the ACAS uplift, in the course of determining the remedy outcome, which was a proper course.

34 The Respondent argues that the percentage uplift should not be reconsidered as the percentage of 15% only covers what I considered to be flaws in the disciplinary process. The Respondent argues that 20% would be excessive given that the Respondent followed a disciplinary procedure and sent appropriate letters, rearranged hearings at the Claimant's request and engaged the services of independent HR consultants to facilitate a fair and unbiased procedure.

35 When considering the judgment, I focused on which elements of the ACAS code of conduct had been breached in terms of procedure. My conclusion was that there was a failure to investigate properly and indeed a failure by Mr Rudston, the independent consultant, to take into account the Claimants' written comments. I have now given thought to why I debated the 20% figure in the course of the hearing, and it is my conclusion that I had in mind matters which I omitted to take into consideration when reaching my conclusion on the uplift. In the light of that I consider that it is proper to reconsider the entire matter of the uplift.

36 The point which I omitted in my judgement was the fact that the ultimate decision to dismiss was made by Mrs Patel who was fully aware of the background facts and in particular knew about the correspondence from the General Dental Council which confirmed that there was no breach of their requirements. She was aware that all Claimants had attended for the first meeting on 4 December (albeit all at once with Mr Wrigley) but had been refused the opportunity to bring Mr Wrigley and she knew before the disciplinary hearing that it as a contractual entitlement to bring Mr Wrigley as a friend. Most importantly, she also knew there was no disciplinary case to answer in relation to the training records. The key charge put to the Claimant was that she failed to comply with a reasonable instruction to bring her CPD training records to her workplace in breach of GDC requirements and was in breach of the GDC rules relating to CPD. There was also a charge that her wilful refusal could have brought the Respondent into disrepute if it was known that it was operating out

of GDC compliance. Mrs Patel knew that the GDC in their email of 30 November 2018 had informed her that the GDC does not require employers to audit their employees or keep a record of employee CPD and so it was not a reasonable instruction nor was the Claimant in breach of GDC requirements. It follows there could be no risk of disrepute. In circumstances where Mrs Patel was well aware there was no need for any disciplinary action at all in relation to the training records, the fundamental essence of the ACAS code was breached. Mrs Patel was aware of the facts of the case but informed the Claimant there was a problem, knowing full well there was none.

37 In reaching the conclusion that 15% was an appropriate uplift, I omitted to consider the role of Mrs Patel and, on balance, taking into account both Mr Rudston's failures and Mrs Patel's failures which I have described above, the figure of 20% was appropriate.

Recalculation

38 The effect of this reconsideration is as follows.

39 First 9 weeks - loss of salary = £2083.68 plus pension loss of £15.66 = £2099.34

40 24 April to 10 May - loss of salary = £333.50 plus pension loss of £3.48 = £336.98

41 11 May to 7 June 2019 - loss of salary = £208.83 plus pension loss of £6.96 = £215.79

42 8 June to 5 July - loss of salary = £293.08 plus pension loss of £6.96 = £300.04.

43 6 July 2019 to 2 August 2019 - loss of salary = £102.17 plus pension loss of £6.96 = £109.13

44 3 August to 30 August 2019 - loss of salary = £164.49 plus pension loss of £6.96 = £171.45.

45 30 August 2019 to 28 September - loss of salary = £223.81

46 29 September to 6 October 2019 – no loss of salary or pension.

47 Total loss of salary and pension = £3,456.54

48 Loss of statutory rights of £400 = £3,856.54

49 Uplift at 20 per cent = £771.31

50 Total Compensatory Award = £4,627.85

51 The Basic award remains as before.

Employment Judge N Walker

Date 7 January 2022