EMPLOYMENT TRIBUNALS

Claimant: Emma Jane Rowlands

Respondent: Gaynor Hartford

Heard on: Video (CVP) **On:** 7 February 2022

Before: Employment Judge S Evans (sitting alone)

Representation
Claimant: in person
Respondent: in person

A CORRECTED JUDGMENT having been sent to the parties on 15th February 2022 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. The matters giving rise to this claim were referred to ACAS by Early Conciliation on 19 August 2020 and a Certificate of Early Conciliation was issued on 17 September 2020. An ET1 was issued by the Claimant on 21st September 2020. The Respondent filed at ET3 out of time on 18 March 2021.

2. A Rule 21 judgment on liability was made by Employment Judge Ryan dated 14 January 2021. The judgment recorded that the Claimant had been automatically unfairly dismissed, that the Respondent failed to pay to the Claimant holiday pay due to her on termination of employment, that further consideration of the Claimant's claim of entitlement to a redundancy payment was deferred to a date to be set and that the remedy to which the Claimant is entitled was to be assessed at a remedy hearing on a date to be set.

3. A hearing was listed for 13 July 2021. At that hearing, the matter was adjourned by Employment Judge Sharp to 7 February 2022. The Order of 13 July records that oral reasons were given for the need to adjourn, centering on the absence of evidence and the need for a fair hearing.

4. The Order of 13 July stated that the Respondent should be permitted to take part in the remedy hearing and "to challenge the amount sought by the

Claimant by cross-examining her and calling Mr. Davies from Dewis Independent to give evidence about the annual leave entitlement and the efforts made by the Claimant to find further work through Dewis after her dismissal." Directions were given as to the exchange of witness evidence and detailed instruction was provided as to the steps the Claimant would need to take if she wished to pursue a claim of compensation for injury to feelings arising from the finding of automatic unfair dismissal.

5. The Order of 13 July set out the issues to be determined at the adjourned hearing on 7 February 2022. These were listed as:

   a. The basic award (age, length of service x weekly pay) – the notice pay of £1296 can be deducted;
   b. The compensatory award (including the amount of lost wages and a claim for loss of statutory rights);
   c. Whether the Tribunal is willing to award injury to feelings and if so, the amount;
   d. The amount of outstanding accrued holiday pay outstanding as the Claimant received £135 in October 2020.

6. The matter came before me on 7th February 2022 by video hearing. Both parties appeared in person. The Claimant was supported by her daughter, Miss Abby Rowlands as the Claimant had an issue with her sight. The Claimant's partner was in the room but took no part in the proceedings. The Hearing began at 10am and was adjourned at 12:40 pm for me to consider my judgment. I returned at 2:10pm to deliver my judgment and was advised by my clerk by an email of 2:07pm that Mr. Greg Davies had joined the hearing. Mr. Davies took no part in the proceedings.

7. The parties had not produced a bundle of documents for use at the hearing but a number of documents were before me. I listed these documents to the parties at the outset of the hearing and both parties agreed that these were the relevant documents, save that the Respondent indicated that there was additional evidence from the Respondent in an email of 8 August 2021. I checked and confirmed that was also in the documents before me.

Preliminary Issues

8. The Claimant raised the point that the Respondent's evidence was received late. The Respondent accepted this and explained the late production of the evidence.

9. On 10th November 2021, an email was sent to the Respondent by the Wales Employment Tribunal confirming that, due to lack of submission of evidence by the Respondent, today's hearing would proceed on the Claimant's evidence only. I sought the Respondent's representations on this point. She confirmed that she had submitted evidence to the Tribunal prior to 10 November 2021. She had not appreciated that it also needed to be sent to the Claimant. The Respondent also stated that no response had been received by her from the Employment Tribunal as a result of her replying to the email of 10th November, stating that the evidence had been submitted. I invited representations from the Claimant. She confirmed she had had time to consider the evidence submitted by the Respondent and raised no objections to the Respondent taking a full part in the hearing before me. I concluded that

no prejudice had been caused to the Claimant by the late submission and that was accepted by the Claimant. In the interests of a fair hearing, the Respondent was able to participate fully in the hearing.

10. The second preliminary issue was with regard to the claim of entitlement to a statutory redundancy payment. The Order of 13 July was unclear as it stated that the Claimant had "succeeded in relation to liability of the following claims: ….Entitlement to redundancy pay (to be determined but the Claimant is reminded she cannot claim for the same thing twice and the unfair dismissal claims are likely to extinguish this claim)." As the issue of entitlement remained live after the Rule 21 judgment in January 2021 and the matter had not been determined on 13 July, I outlined to the parties the three scenarios in which a redundancy situation can arise under s.139 Employment Rights Act 1996. It was accepted by the Claimant that the termination of her employment did not fall within any of the three redundancy situations and it was agreed that the claim of entitlement to a statutory redundancy payment would be dismissed by consent.

Findings of Fact

11. In making my findings of fact, I had regard to all the written documents identified with the parties at the outset of the Hearing and the oral evidence of the Claimant and Respondent. Although Mr. Greg Davies was mentioned as a potential witness in the Order of 13 July 2021, he did not give oral evidence at the hearing. The Respondent indicated to me, whilst giving her evidence, that she had asked Mr. Davies to attend and sent him the link to the hearing but she had not heard from him. By the time I was advised that Mr. Davies was in attendance, the evidence was concluded and I was returning to deliver my judgment. No request to re-open the evidence was made. An unsigned and undated statement from Mr. Davies was within the documents before the Tribunal and therefore formed part of my consideration of the evidence.

12. The Claimant's date of birth is 2 June 1978. Her employment ended on 26 July 2020. The Claimant was aged 42 at the date of termination of her employment.

13. There was some conflict of evidence as to the length of the Claimant's employment. The Claimant's clear and consistent evidence was that her employment began on 1 April 2009. This was also the date given in her ET1. The Respondent's late ET3 sent to the Tribunal by an email of 18 March 2021 indicated that the dates of employment set out in the ET1 were correct. The undated and unsigned statement of Mr. Greg Davies sent to the Tribunal under cover of an email of 8 August 2021 stated that the employment began on 1 August 2014. In evidence, the Respondent's recollection of when the employment began was unclear and she told me she had no evidence to contradict the start date of 1 April 2009. The notice payment made to the Claimant amounts to just under ten weeks' gross pay. The statement of Mr. Davies, referred to in this paragraph, states that the notice payment was "calculated on the advice given by ACAS to Ms Harford of 1 weeks' notice for every year worked." He goes on to say that this was an overpayment "due to a misunderstanding as to when Ms E J Rowlands commenced work. 9 weeks' notice was paid whereas it should have been 5 weeks." This information was not given in oral evidence at the hearing. I have considered all the documents and oral evidence given to me as to the start date of the Claimant's

employment with the Respondent and prefer the evidence of the Claimant as to the start date. Her evidence was affirmed and clear and the only evidence to contradict is was the statement of Mr. Davies. I attach less weight to this as it was unsigned, undated and was not given in oral evidence to afford the Claimant an opportunity of cross examination. I make a finding of fact that the start date was 1 April 2009.

14. The Claimant was employed as a Personal Assistant to the Respondent's son. The Claimant worked 16 hours a week and was paid £576 a month gross. The 16 hours a week were made up over three days each week, working around five hours and 20 minutes a day. The gross weekly pay was 132.69 per week.

15. After termination of her employment with the Respondent, the Claimant did not receive any state benefits. She received the sum of £1296 from the Respondent which the parties referred to as notice pay.

16. The Claimant's holiday year began on 1 April. She was entitled to the statutory minimum annual leave entitlement of 5.6 weeks. In the holiday year commencing 1 April 2020, the Claimant took two weeks' holiday immediately before the termination of her employment. A payment of £135 holiday pay was made by the Respondent to the Claimant after the termination of her employment. The Claimant accepted that she was not due any further holiday pay.

17. After the termination of her employment, the Claimant applied for a job with a company called Values in Care. She was interviewed for that post on 8 September 2020 but was unsuccessful. In addition, in August 2020, she was in communication with a local lady as to the possibility of the Claimant assuming a role caring for this lady's son. In August 2020, it was confirmed to the Claimant that this role would be available to her but there were subsequent extensive delays in arranging funding for that role and it did not materialize.

18. The Claimant's ability to seek alternative employment was hampered by the fact that she had to seek employment locally as she had had to part with her car for financial reasons. She was further hampered by a number of lockdowns due to the Covid-19 pandemic, from September 2020 to January 2021 and from April 2021 to June 2021. The Respondent agreed with the Claimant 's evidence that the lockdowns had caused issues and that it was difficult to secure employment at that time.

19. In December 2020, the parties were in contact and discussed the Claimant returning to work for the Respondent in January 2021 but nothing further came of this.

20. When Covid-19 restrictions eased in August 2021, the Claimant secured a role caring for an elderly lady. She began work on 4 October 2021 and remains working in that role.

Conclusions

21. In accordance with the statutory formula under s.119 Employment Rights Act 1996, given the Claimant's age, length of service and gross weekly pay, the

basic award for unfair dismissal is £1525.94 as set out in the calculation shown in the corrected judgment sent to the parties on 15 February 2022.

22. Turning to the compensatory award and the provisions of s.123 Employment Rights Act 1996, the Tribunal considered loss of statutory rights and loss of earnings. Neither party suggested any other element that should be included in this award and the Respondent did not advance any arguiments that deductions should be made. The Claimant had no earnings between 27 July 2020 and 4 October 2021. The maximum award that the Tribunal can make is for a period of 52 weeks. This amounts to a total of £6,899.88 gross based on a weekly gross figure of £132.69. The Claimant took what steps she could to seek alternative employment and the Respondent did not discharge her burden of proving failure to mitigate as no evidence of this was adduced and the Respondent conceded that securing employment at the relevant time was difficult. I find that it is just and equitable, having regard to the evidence before me, that the Claimant is awarded the maximin loss of earnings of £6899.88 gross. In addition an award of £265 is made for loss of statutory rights representing two weeks' gross pay.

23. The Claimant has received a sum of £1, 296 from the Respondent leaving a sum outstanding of £5,868.88 gross for the compensatory award.

24. In her evidence, the Claimant included a claim for injury to feelings. The parties were reminded of the contents of the Order of 13 July 2021 where Employment Judge Sharp referred to a range of authorities. Injury to feelings awards are generally not permitted to be made in an unfair dismissal claim. The Claimant was invited to address the Tribunal on whether, in accordance with those authorities, there was an entitlement to an award for injury to feelings. No submissions on this point were made by the Claimant. Having consulted the authorities outlined in the Order of 13 July 2021, I concluded that the law did not permit me to make an award for injury to feelings within this claim.

Request for Reconsideration

25. On 14 February 2022, I was notified that the Respondent had contacted the Tribunal disputing how long the Claimant had been working for her and requesting a reconsideration. The Respondent's email stated:
"I received the judgement on Saturday morning. But I think there's been a misunderstanding. Judgement states Miss Rowlands been under my employment for 11yrs which is not the case. Mrs Rowlands was working for viva up antill 2014. I was not her employer. I did not take over the finances antill then before I was not not the employer. Please can this be looked at. As is the amount Mandatory or based on time served. I sent a picture of the contact I've got."

26. There were two attachments to the email: an extract from a bank statement dated 2022 and a copy of the original judgment sent to the parties after the hearing on 7 February 2022.

27. I had regard to the provisions of Rule 72 of The Employment Tribunal Rules of Procedure 2013 (as amended) and to my notes of the hearing on 7 February 2022.

28. I issued a judgment refusing the Respondent's application for reconsideration on the ground that there was no reasonable prospect of the original decision being varied or revoked because the Tribunal made a finding of fact, after hearing evidence from both parties, that the claimant's employment commenced on 1st April 2009.

29. The matter was fully explored at the hearing on 7 February 2022 and the Respondent had every opportunity to draw any conflicting evidence to my attention. My note of the hearing shows that in closing submissions, the Respondent said that she had "said all I can say" and both parties confirmed they had had an opportunity to say all they wanted to say. I gave my reasons orally at the end of the hearing on 7 February and included reference to my finding that the start date of the employment was 1 April 2009. The Respondent asked one question at the end of the delivery of the oral judgment and that related to how she could pay the judgment sum.

Employment Judge **S. Evans**

Date 13 April 2022

REASONS SENT TO THE PARTIES ON 14 April 2022

FOR THE TRIBUNAL OFFICE Mr N Roche