EMPLOYMENT TRIBUNALS

Claimant: Ms A Portosi

Respondent: MacAusland Design Limited

REMEDY JUDGMENT AND REASONS OF THE EMPLOYMENT TRIBUNAL

HELD (REMOTELY)
AT LONDON CENTRAL **On: 21 July 2022**

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances
For the claimant: Mr P Tomison (Counsel)
For the respondent: Mr P Lonergan (Legal Consultant)

JUDGMENT

1. **The Tribunal makes a <u>Total award of £19,345.36</u> to be paid by the respondent to the claimant. The detailed calculations are as set out in paragraphs 29 and 30 of the Reasons below.**
2. **The award is made in respect of the judgment on liability sent to the parties on 11 May 2022 (Hearing held on 26 and 27 April 2022).**
3. **The Tribunal gave its decision and reasons orally at the end of the hearing. The respondent requested written reasons, which are set out below.**

REASONS

Background and Issues

1. This was a remedy hearing following the judgment on liability sent to the parties on 11 May 2022 (Hearing held on 26 and 27 April 2022).

2. The tribunal's decision was that the claimant's unfair dismissal claim was successful on procedural grounds; essentially because there was no reasonable investigation carried out and no independent appeal was heard. The claimant's other claims did not succeed. The tribunal had ordered a 50% reduction in the compensatory award due to the claimant's contributory conduct.

3. At the commencement of the hearing I clarified with the parties' representatives the issues to be determined at this hearing. These were agreed as follows:

    - has the respondent shown on a balance of probabilities that the claimant has failed to mitigate her loss;
    - at what point would the claimant have returned from furlough to full pay? The claimant maintained in her schedule of loss that she would have returned from furlough on 30 November 2020. The respondent had made no indication as to the relevant date, but in his oral evidence (in response to tribunal questions) Mr MacAusland said that hypothetically the claimant would have returned once the furlough scheme had ceased, which the parties agreed was on 30 September 2021;
    - should the tribunal increase the compensatory award by 25% for an unreasonable failure to comply with the ACAS Code of Conduct on Disciplinary or Grievance procedures 2015?

Conduct of the hearing

4. The hearing was conducted remotely on CVP.

5. The claimant presented a Remedies Hearing Bundle of 79 pages including the claimant's schedule of loss. Both the claimant and Mr MacAusland produced written statements which they adopted as their evidence in chief. Mr Tomison produced a written skeleton argument, which set out the relevant legal principles which were agreed by Mr Lonergan. Both parties' representatives gave oral submissions.

6. In accordance with Presidential Guidance, the tribunal confirmed with the claimant that although the address on her witness statement was in Italy, where she was currently based, she had travelled to the UK to give her evidence to the tribunal.

7. Mr MacAusland revealed during the course of his oral evidence that he suffered from Chronic Fatigue Syndrome, which had not been made known previously to the tribunal by either him or Mr Lonergan. The tribunal accordingly allowed Mr MacAusland such breaks as he needed, as reasonable adjustments for his medical condition.

Findings of Fact

8. The tribunal will only make such findings of fact as are relevant to determine the issues as set out above.

Mitigation

9. Following her dismissal with effect from 30 September 2020, the claimant said that whilst her preference was to remain in the UK, she also investigated the option of moving to Italy as her father had been unwell. At that time there were very limited openings in architectural businesses because the pandemic was still ongoing; there was limited commissioning of new projects.

10. The claimant applied for various roles in both the UK and Italy shown at pages 1-28 of the remedies bundle. The respondent accepted that the claimant had applied for 13 jobs in the period October 2022 - 19 January 2021.

11. It was put to the claimant in cross-examination that she had been unduly aspirational in her applications and had not been realistic in applying for suitable roles. However, the tribunal finds that the respondent has not produced any evidence to support that allegation. In responding to the question, the claimant was able to demonstrate references in her CV to appropriate experience, even if this was not lengthy or significant experience.

12. The claimant obtained temporary alternative employment in Italy from 8 February 2021 - 31 July 2021 with two different organisations. She then obtained a fixed term contract, which is due to expire in July 2024, in Italy with ASUGI, a public sector employer. The claimant explained that she had given assurances to her employer that she would remain in the contract for at least one year. The claimant also explained that her father had died in December 2021 and that she needed for family reasons to remain in Italy to provide care and support to her mother.

13. The claimant was taken in cross-examination to an email dated 28 August 2021 from Amos Goldreich to whom she had applied for a role in January 2021. This updated the claimant to say that the company was recruiting for project architects and also needed freelance architects. There were various job opportunities but the pay for a project architect would not be more than £39,000 per annum. The claimant was asked why she had not taken up this opportunity and she repeated the reasons she had given for wishing to stay in Italy for family reasons and because she had promised her employer that she would remain in her contract for at least one year.

14. I accept the claimant's evidence as honest, but this shows that the decision not to pursue the opportunities with Goldreich, were essentially a matter of personal choice. I find that the claimant was not reasonable in refusing the possibility of mitigating her loss at this stage.

15. Mr MacAusland provided a lengthy witness statement in which he stressed his expertise in the industry and gave his opinion on the job market at the relevant periods. However, he accepted (in cross examination) that he had no recruitment experience or expertise. He further accepted that the respondent had not produced any evidence to the tribunal to suggest that there were suitable jobs available for which the claimant had failed to apply, over the relevant periods. Nor had the respondent produced any evidence from recruitment agencies with evidence to that effect.

16. Mr MacAusland said he had not been aware that he needed to produce such evidence, however, he has been advised throughout by HR industry advisers and would have received legal advice and support in preparing for the hearing. He was represented at the hearing by Mr Lonergan.

17. I find that the respondent has not shown on a balance of probabilities that the claimant's has failed to mitigate her loss.

Return from Furlough

18. The claimant said she would have returned from furlough to full pay on 30 November 2020. Mr MacAusland said in his witness statement that the industry had generally returned to some buoyancy in October 2020, which would appear to support the claimant's statement., However, Mr MacAusland said that the respondent's business did not reflect the general trend in that there was a lengthy delay between leads and securing income. The respondent did not produce any management or corporate accounts to support Mr MacAusland's evidence with regard to the respondent's business.

19. Mr MacAusland said that he had returned from furlough when the scheme ended, though he could not recall the exact date. He said that the other architect working in the business had resigned during lockdown and that he had not recruited anyone to replace the claimant. He said (in response to a tribunal question) that hypothetically if the claimant had not been dismissed she would have returned from furlough when that scheme ended, again he could not recall when that would be. I note that MacAusland had not given this evidence in his lengthy statement or anywhere else.

ACAS Uplift

20. Mr Tomison sought the full 25% uplift for breach of the ACAS code. He said the breaches were deliberate and unreasonable. It is for the tribunal to decide the level of a just and equitable uplift.

21. Mr Lonergan said that whilst the fact of the breaches was accepted, he maintained that the spirits of the ACAS code had not necessarily been breached. Mr MacAusland had made an effort to ensure that the disciplinary

process had been fair reasonable and proportionate and the process was not a sham. The respondent had made reasoned choices which led to the procedural failures. The investigation had not been evaded: Mr MacAusland had not felt it necessary as he was aware of all the facts. An independent appeal was not held because of the respondent's financial situation and the costs of securing a third party to hear the appeal. This was not a flagrant breach of the ACAS code.

22. I note, as submitted by Mr Tomison, that the respondent was advised by an external HR company and, therefore, should have been fully aware of the relevant codes of practice when reaching the relevant decisions. This would mean the respondent should also have been aware of the consequences of making those decisions and the potential impact that would have on any tribunal award, should the claimant succeed in any tribunal claims.

Conclusions

Mitigation

23. I accept that the claimant took reasonable steps to mitigate her loss following her dismissal. However, I also find that the claimant could and should have pursued the opportunities with Goldreich in August 2021. It was agreed that the maximum pay available would have been £39,000 gross which translated to a net weekly pay of £580.46. Given that the claimant's full net pay with the respondent was £592.49: the ongoing shortfall was £12 per week.

Return from furlough

24. I do not accept Mr MacAusland's oral evidence, that if not dismissed, the claimant would have returned from furlough in September 2021. Given the extensive evidence at the liability hearing of Mr MacAusland's dissatisfaction with the claimant's performance it is unlikely that this would have been the case.

25. Further, given Mr MacAusland's own evidence with regard to the buoyancy of the market and the respondent's failure to produce any financial evidence relating to its own situation over the relevant period I find that the claimant would on the balance of probabilities have returned to full pay from 30 November 2020.

ACAS uplift

26. The respondent's breaches of the ACAS code were, as described by Mr Lonergan's own submissions, "reasoned decisions". Whilst there may be no element of malice in reaching these decisions they were nevertheless a deliberate breach of the code.

27. In **Slade v Biggs**, the EAT gave guidance on assessing the appropriate percentage uplift, which was essentially that the tribunal must make such award as it considers just and equitable within the requisite limits. Mr Tomison proposed an uplift at 25%: Mr Lonergan suggested 5%.

28. On the basis that I accept the breaches were not in any way malicious, but were nevertheless deliberate I make an uplift award of 15%.

Calculations

29. The parties' representatives agreed the relevant figures as set out in the schedule of loss and I make my calculations based on those figures.

    Basic award - £2421 (being 3 years' service x 1.5 x £538)

    Loss of Earnings

    From 30 September 2020 to 30 November 2028 – 8 weeks at £444.06 per week (Furlough Pay) - £ 3552.48

    From 30 November 2020 – 21 July 2022 85 weeks x £592.49 (full net weekly pay) - £50,361.65

    Less the amounts credited by the claimant for her temporary employment and her contract commencing on 1 August 2021 totalling £26,015.48

    Plus future loss of earnings at 26 weeks times £12 per week (representing the shortfall between full net week pay (£592.49) and the net pay which would have been payable if the job opportunity at Goldreich had been taken (£580.43) - £312

    Plus pension loss (as agreed by the respondent) - £973 .02

    Plus loss of statutory rights. The claimant claimed £450 but given her short length of service the tribunal awards - £250

    Total compensatory award - £29,433.67

    Plus uplift of 15% - £4415 - £33,848.72

    Less 50% contributory fault - £16,924.36

    Plus basic award £ 2421

30. The total award made to the claimant is **£19,345.36**

D Henderson
Employment Judge Henderson

JUDGMENT SIGNED ON: 26 July 2022

JUDGMENT SENT TO THE PARTIES ON
.26/07/2022

FOR THE SECRETARY OF THE TRIBUNALS