



EMPLOYMENT TRIBUNALS

Claimant: Ms Julie Churcher

Respondent: Tesco Stores Ltd

Heard at: London South Croydon by CVP

On: 16 May 2022

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: In person

Respondent: Ms R Kight, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT ON REMEDY

The judgment of the Employment Tribunal is as follows:

- 1) Liability having been conceded by the respondent, the claimant is awarded the following in respect of her claims:

Damages for breach of contract in the sum of £994.31

Unauthorised deduction from wages in the sum of £680.59

Unfair dismissal: a basic award in the sum of £1560.90 and a compensatory award in the sum of £1698.38.

- 2) The total award of compensation payable by the respondent is £4,934.18.

REASONS

Background

1. The claimant was employed by the respondent from 16 August 1993 until dismissal with effect on 10 March 2020. By a claim form presented on 27 April 2020, following a period of early conciliation from 6 to 9 April 2020, she brought complaints of unfair dismissal, age discrimination, disability discrimination, unauthorised deductions from wages and damages for breach of contract in respect of entitlement to notice of dismissal. In its response dated 18 August 2020, the respondent denied the claim in its entirety.
2. In an email to the Tribunal dated 24 June 2021, the claimant withdrew her complaints of age and disability discrimination. The respondent presented amended grounds of resistance to its response dated 28 June 2021.
3. A preliminary hearing was conducted by Employment Judge Harrington on 22 July 2021. A full hearing was set for 3 days commencing 16 May 2022, the issues in the remaining complaints were identified and case management orders were made in order to prepare the case for that hearing. Employment Judge Harrington also issued a Judgment recording the discrimination complaints as dismissed on withdrawal.
4. By email dated 21 January 2022, the respondent conceded liability in respect of the remaining complaints of unfair dismissal, unauthorised deduction from wages and damages for breach of contract in respect of entitlement to notice of dismissal.
5. The Tribunal wrote to the parties by letter dated 3 May 2022 acknowledging the respondent's admission of the remaining complaints and notified the parties that the hearing listed for 16 to 18 May was converted to a one day remedy hearing. The Tribunal also made case management orders for disclosure of documents relevant compensation, the provision of a bundle and any witness statements that either party wish to rely upon.

Conduct of the hearing

6. The hearing was scheduled to start at 10 am today by CVP. Unfortunately, the Employment Judge who had been allocated the case was indisposed. The parties were told that the case would be reallocated to another Judge and would commence at 2 pm. Ms Kight indicated that she would have to leave by 4 pm due to a family commitment. My morning case completed early and my afternoon case was adjourned. I was therefore in a position to hear this case albeit unable to commence the hearing until 12.40 pm.

Documents

7. I had in front of me a bundle of documents comprising of 246 pages (which I refer to a "R" followed by the relevant page number where necessary), the respondent's counter schedule of loss dated 16 May 2022 and an email from

the respondent's solicitors to the claimant dated 20 October 2020. I also had available a copy of an earlier bundle of documents provided by the claimant consisting of 102 pages (which I refer to as "C" followed by the relevant page number where necessary). This would appear to have been prepared for the full hearing prior to admission of liability. The claimant's schedule of loss is at R60-63 and at C5-6.

Evidence

8. I heard oral evidence from the claimant in the absence of a witness statement and submissions from both parties.

Findings

9. I was able to agree a number of the heads of compensation between the parties but in view of the limited amount of time I reserved judgment in respect of the compensatory award for unfair dismissal. There were no findings of fact on which to deal with this matter and I have limited my findings to those which are relevant to the assessment of remedy.
10. The following facts were accepted by both parties. The claimant was employed as a Customer Assistant – Self Service at Tesco Brooklands Extra in Weybridge. She commenced employment on 16 August 1993 and her employment came to an end on 10 March 2020. The latter date is the effective date of termination for the purposes of the unfair dismissal and wrongful dismissal complaints. The claimant was aged 44 at the effective date of termination. She was employed to work one day a week on a Sunday and her gross and net weekly pay was £72.60.
11. The respondent's position is that on or around 23 February 2020, it became aware that the claimant had failed to attend work for her scheduled shift. Attempts were made to contact her by telephone to no avail. The respondent wrote to the claimant on 2 March 2020 advising her that she was absent from work without leave and invited her to attend a disciplinary hearing on 6 March 2020 (at R215). The claimant did not attend on that date and so the respondent wrote to her again on 6 March 2020 inviting her to attend a rescheduled disciplinary hearing on 10 March 2020 (at R214). The claimant did not attend on that date, the respondent proceeded with the hearing in her absence and concluded that the claimant was guilty of gross misconduct and decided to dismiss her summarily without notice. The respondent wrote to the claimant advising her of her dismissal and she was given the right of appeal within one week of the date of receipt of the letter (at R70). The claimant did not appeal the decision. The respondent now accepts that the claimant was dismissed in the erroneous belief that she was absent without leave.
12. The claimant was clearly very aggrieved at the time about what had happened and still is. Her position is that she was abroad on agreed annual leave on 23 February 2020 onwards. She requested leave on 25 November 2019 (at C21) and it was agreed by the respondent on 6 April 2019 (at C15). She had also agreed leave, shift swaps and unpaid leave (at C16 & 20). This appears to mean that she was not scheduled to work on 1 and 8 March 2020

and was on unpaid leave. The claimant only discovered the letters from the respondent and that she had been dismissed on her return on 19 March 2020. She did not have the opportunity to appeal because the deadline in which to do so was seven days. She believed that the respondent would never have extended the deadline because three managers had colluded in dismissing her. She was refused Jobseekers Allowance because she had insufficient national insurance contributions on which to qualify (R127A & B).

13. The respondent provided a counter schedule of loss. The claimant said she did not have this and so I offered her 5 minutes to read it given that it was only 3 pages long and responded to her own schedule. Ultimately we went through it together during the hearing.

Wrongful dismissal

14. The parties accepted the following. The claimant's notice period would have been from 10 March 2020 until 1 June 2020. The claimant was entitled to the statutory maximum notice entitlement of 12 weeks. This amounts to $12 \times £72.60 = £871.20$. In addition, she would have received 12 weeks employer's pension contributions of £3 per week for 12 weeks = £36 and two 10% Covid bonuses on 1 May and 29 May 2020 = £87.12. I therefore make a total award of damages for breach of contract in the sum of £994.32.
15. The claimant also sought damages in respect of loss of her discount card and referred me to R130. The respondent's position was that this was a loss of the use of a card and so the amount of damages recoverable would be entirely based on the extent to which the card would have been used. In any event the respondent relied upon R78 as an indication that the claimant continued to use her card during the notice period. The claimant denied this. I decided that it was inappropriate to make an award of damages in respect of a discount card given that it represented an entirely speculative award given that its value is based on use in the future.

Unauthorised deduction from wages

16. The parties agreed that the claimant was entitled to compensation in respect of unauthorised deductions from wages as follows: accrued but untaken annual leave for 23 February 2020 = £72.60; a personal day on 15 March 2020 = £72.60; payment for her shares = £535.39.
17. I therefore make an award of compensation in light sum of £680.59.

Unfair dismissal

18. The calculation of compensation for unfair dismissal is set out in sections 118 to 124A of the Employment Rights Act 1996.

Basic Award

19. The claimant is entitled to a basic award of $21.5 \times £72.60 = £1560.90$. This is based on 20 years' of complete service, the maximum which I can take into account, her age of 44 at the effective date of termination and a week's pay

of £72.60. The multiplier is 21.5 taking into account that years of service below the age of 22 are based on half a week's pay, years of service between 22 and 41 are based on one week's pay and years of service from the age of 42 and above are based on 1.5 weeks pay.

20. The claimant did not accept that this was the correct calculation and disputed my findings several times. I did explain to her that this was not open to dispute and was prescribed by legislation (which I have referred to above).

Compensatory Award

Loss of earnings

21. The claimant's weekly net pay was £72.60. She was dismissed on 10 March 2020.
22. She seeks past loss of earnings to the date of the hearing for the period of 2 years and 2 months in the sum of £8,391.50 plus a number of other heads of compensation in respect of pension and benefits.
23. She seeks future loss for what would appear to be the same period of time of 2 years and 2 months plus a 2.5% salary increase in the sum of £8,601.28.
24. The respondent's primary case is that the claimant should only be entitled to recover losses up to the date on which she was offered and did not accept re-engagement (1 December 2020 as referred to below). This is calculated for a 38-week period between 10 March and 1 December 2020 within its counter schedule of loss. In the alternative, the respondent submits that the claimant's compensatory award would be capped under the legislation at 12 weeks' pay (under section 124(12A) of the Employment Rights Act 1996. This is also set out in its counter schedule of loss.
25. The respondent made the following submissions in support of its calculations:
 - a. Whilst it erroneously believed that the claimant was absent from work without leave when it initiated its disciplinary procedure resulting in her dismissal, the claimant did not appeal. Instead, she went straight to Acas under the Early Conciliation procedure and then issued her tribunal claim. This was a serious breach of the Acas Code of Practice on Disciplinary and Grievance Procedures (2015) and should result in the maximum 25% reduction in any compensation awarded to her (under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992).
 - b. The respondent offered the claimant re-engagement in a letter sent to her on 1 December 2020 at the same Tesco store from the date of her dismissal, on the same terms and conditions as before and with payment of wages owed from her dismissal (R71). Whilst the claimant denies receiving this letter, the respondent made the same offer via Acas (at R135) and made the same offer this morning and the claimant refused re-engagement. These are clearly without prejudice discussions. Its primary case is that the best the claimant can argue is that she should be entitled

to losses to 1 December 2020. Had she done so it is highly likely we would not be at this hearing today.

- c. The claimant has provided no evidence of her attempts to mitigate her loss save that she was refused social security benefits.
- d. The claimant has provided no evidence of her resources used.
- e. The respondent has not given staff thank you vouchers since January 2020 (at R133).
- f. Pension life cover is not part of the pension scheme.
- g. The claimant did not qualify for the card for life, a discount card, for another 3 years and its value is speculative because it relates to what you buy with it.

26. The claimant's position is that:

- a. When the respondent was writing to her regarding her absence and took the decision to dismiss her, she was out of the country and they knew this.
- b. She believes she was dismissed for the reasons set out at the bottom of R15 of her claim form.
- c. She did not appeal because she was unaware of her dismissal until her return from leave.
- d. She did not receive the letter offering re-engagement and was unaware of any offer via Acas.
- e. She was looking for retail work around March 2020, but all of the shops were shut. She would have taken anything but if you phone up a recruitment agency you just get an answerphone because of Covid-19.
- f. She did make attempts to find work but if you tell prospective employers you have been dismissed then you are not going to get the job.
- g. As to the resources used. I asked how she had worked these figures out and she said ink two cartridges at £25 each, paper two reams at £2.50, stamps for sending documents to the tribunal and electricity on top of that.
- h. She was entitled to the pension life cover is set out at R80.
- i. She was entitled to a card for life.
- j. She had not received her pay slip or P60s. I did point out that the former was not part of her claim and I had no jurisdiction to deal with P60s.

Conclusions

27. These are my reserved conclusions as to the compensatory award having considered the evidence before me.
28. I accept that the claimant did not receive the letter of 1 December 2020 offering her re-engagement. Whilst this was not canvassed of her, given her view of the respondent's actions, I think it unlikely she would have accepted in any event and it is not an unreasonable position in the circumstances. As she says, she was absent by agreement and in any event, she only appears to have missed 3 shifts before the respondent set about a somewhat brief disciplinary process and dismissed her.
29. I do not accept that the claimant has mitigated her loss. She did not provide adequate evidence of her attempts to find further work. On balance of probability, I did not accept that she had made sufficient efforts to find alternative retail work given that she appears to have erroneously believed that during lockdown all the shops were shut. Even anecdotally it is apparent to me that supermarkets were open and indeed home deliveries sharply increased which in turn would have created an increased demand for staff. She only had to find employment for one day a week and indeed she indicated that she was willing to do any work, not just retail. I accept that leaving employment in circumstances of dismissal for gross misconduct would not have helped. But doing the best I can, I take the view that it was reasonable of her to have secured alternative employment within 6 months of her dismissal. On this basis I am prepared to award her six-months' loss of earnings. I therefore award 26 weeks at £72.60 per week which amounts to £1991.60. As a result, I am not prepared to make any award for future loss of earnings
30. I also award the claimant the loss of her employer pension contributions for 26 weeks at £3 per week in the sum of £78.
31. In addition I award the claimant her COVID bonus payments for 1 and 29 May and 26 June 2020 at the rate of £29.04 for each and so totalling £87.12.
32. I accept the respondent's evidence that it has not given staff thank you vouchers since January 2020, that pension life cover is not part of the pension scheme (and even if it is it is represented in the lost pension contributions which have been awarded to her) and that the claimant did not qualify for a card for life at the time of dismissal.
33. With regard to the figure of resources used, the claimant has provided no evidence in support of this, and I did not find her breakdown of what this figure represented to reasonably reflect resources that could have been used in preparation of this case. I appreciate that she has provided a bundle of documents of 102 pages and I accept that she made 3 copies of this and so I am prepared to award her a figure of £30.60 in respect of 3 x 102 pages at 10p per copy and postage of first class recorded delivery in the sum of two times £2.69 and so totalling £5.38. This comes to a total of £35.98. I take the view that had the respondent conceded liability sooner the claimant would

not have incurred these expenses. The tribunal's copy of the bundle was received on 14 October 2020.

34. I also award the claimant the sum of £500 for loss of statutory rights, reflecting that she would have to be employed for further 2 years in order to obtain the protection against unfair dismissal.
35. I was not asked to and am not going to make any deduction in respect of contributory fault.
36. With regard to the respondent's submission that the claimant has failed to follow the ACAS Code by not appealing against her dismissal. I accept that the claimant should have appealed but I find her reasons for not doing so are reasonable taking into account also her level of grievance with the reason for dismissal when the respondent should have known that she was on leave and the speed with which it embarked upon a disciplinary process and dismissed her. I am therefore not prepared to reduce her award.
37. With regard to the claimant's submission that the respondent did not follow the ACAS Code, she has not pointed to any specific failings. Whilst it might be the case that the respondent acted on an erroneous belief and somewhat perfunctorily, it did follow the basic steps set out in the Code. It wrote to her advising her of the nature of the disciplinary offence, warned her that this could amount to a dismissible offence, advised her of her right of accompaniment, reschedule the hearing when she did not turn up, wrote to her advising her of the outcome of the hearing held in absence and the reasons for her dismissal and offered her the right of appeal.
38. The compensatory award is therefore calculated as follows:

| | |
|--|----------|
| Loss of earnings | £1991.60 |
| Loss of pension contributions | £78 |
| Loss of bonus payments | £87.12 |
| expenses incurred | £35.98 |
| loss of statutory rights | £500 |
| | |
| Sub-total | £2692.70 |
| | |
| Less damages for breach of contract ¹ | £994.32 |
| | |
| Total compensatory award | £1698.38 |

39. The Employment Protection (Recoupment of Benefit) Regulations 1996 do not apply.

Application for a Time Preparation Order

40. The claimant has also made an application for a Time Preparation Order. However, I indicated that I was not prepared to deal with this because she had simply provided a total figure without a breakdown. I suggested that if

¹ to avoid double recovery

she wants to pursue this, she must provide a breakdown of the time spent indicating on what dates and time spent and what preparation was undertaken. I did comment that the number of hours claimed did appear excessive.

Employment Judge Tsamados
16 August 2022

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