EMPLOYMENT TRIBUNALS

Claimant: **L Mergell**

Respondent: **Vauxhall Surgery – Dr Shah**

Held at: **London South Employment Tribunal by video hearing**

On: **13 July 2022**

Before: **Employment Judge L Burge**

Representation
Claimant: D Patel, Counsel
Respondent: E McFarlane, Consultant

REMEDY JUDGMENT having been given orally to the parties on 13 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant was employed by the Respondent from 1 April 2010 until she was dismissed on 19 November 2018 for alleged misconduct.

2. At a final merits hearing on 9 and 10 June 2021 the Tribunal decided that:

    a. The Claimant had been unfairly dismissed by the Respondent.

    b. There should be no Polkey reduction to the compensatory award, an uplift to the compensatory award of 20% for failure to follow the ACAS Code and a reduction of 10% to the basic and compensatory awards on the grounds of contributory fault.

    c. The claim of wrongful dismissal was well founded and succeeded.

3. The Claimant gave evidence to the Tribunal, she answered the questions in a straightforward, direct manner and I believed her.

Findings of fact

1. The Claimant was aged 61 at the date of her dismissal on 19 November 2018 having worked for the Respondent for 8 years.

2. The Claimant was signed off sick by the GP because of the stress and anxiety she was suffering as a result of her dismissal and the way in which it was carried out by the Respondent. The result was that she was unable to apply for jobs until June 2019. When she did apply for 3 permanent jobs she was not selected, twice she was unable to continue with the interview because she was so upset when talking about the Respondent's investigation. The Claimant also made several applications on the NHS website for Nursing roles but did not hear back. Having to disclose that she had been summarily dismissed for gross misconduct meant that she was unable to get a permanent job at that time.

3. The Claimant found temporary work from August 2019 as a locum practice nurse for two GPs based in Lambeth. She was then able to get references from those GPs to get a locum job at Aqua Health Care and work as a covid vaccinator. On average she worked 2 or 3 days a week. The Tribunal accepts her evidence that her anxiety remained as a result of her dismissal and she therefore could not work more days a week.

4. During the pandemic lockdowns the Claimant's locum hours were reduced.

5. In July 2021 the Tribunal decided that the Claimant had been unfairly dismissed from the Respondent.

6. The Claimant continued working her locum roles until the end of April 2022 when she moved to Merseyside because of the cost of living in London and to be near her daughter. I do not accept her move away was a result of the Respondent's dismissal.

Law

7. Section 123 of the Employment Rights Act 1996 provides:

> *(1) … 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 in so far as that loss is attributable to action taken by the employer.*
>
> *(2) The loss referred to in subsection (1) shall be taken to include—*
>
> *(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and*
>
> *(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*
>
> *…*
>
> *(4) 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 or (as the case may be) Scotland.

…

(6)Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

8. S.124(1ZA) Employment Rights Act 1996 caps the compensatory award (at the date of the Claimant's dismissal) to £83,682 or a year's gross pay, whichever is lower.

9. In *Gardiner-Hill v Roland Berger Technics Ltd* 1982 IRLR 498, the Employment Appeal Tribunal said that where there is a substantial issue as to failure to mitigate, an employment tribunal should ask itself:

   a. what steps were reasonable for the claimant to have to take in order to mitigate his or her loss;

   b. whether the claimant did take reasonable steps to mitigate loss; and

   b. to what extent, if any, the claimant would have actually mitigated his or her loss if he or she had taken those steps.

10. In *Cooper Contracting Ltd v Lindsey* 2016 ICR D3, EAT (per Langstaff J):

    a. The burden of proof regarding a failure to mitigate is on the wrongdoer. A claimant does not have to prove that he or she has mitigated the loss.

    b. If no evidence as to mitigation is put before the employment tribunal by the wrongdoer, it has no obligation to look for that evidence or draw inferences. This is how the burden of proof works in this context: responsibility for providing the relevant information belongs to the employer.

    c. The employer must prove that the claimant has acted unreasonably. The latter does not have to show that what he or she did was reasonable.

    d. The tribunal should not apply a standard to the claimant that is too demanding. He or she should not be put on trial as if the losses were his or her fault, given that the central cause of those losses was the act of the employer in unfairly dismissing the employee.

11. In *Singh v Glass Express Midlands Ltd* 2018 ICR D15, the EAT reminded the Tribunal that the burden is on the employer to prove that the Claimant's failed to mitigate and expressed some reservation about whether the employer could discharge the burden of proving that the Claimant has failed to mitigate through cross-examination alone, Her Honour Judge Eady said:

> *Even if it is possible for a Respondent to discharge the burden in this way, the ET needed to be clear that the burden remained on the Respondent throughout, and its reasoning needed to demonstrate that it had not confused what might have been the failure to take reasonable steps by the Claimant with the establishment by the Respondent that he had acted unreasonably in mitigating his losses; the two questions are not automatically the same*

Conclusions

12. The Claimant is under a duty to mitigate her losses, but when calculating the compensatory award, the calculation should initially be based on the assumption that the employee has taken all reasonable steps to reduce his or her loss. The burden of proof regarding a failure to mitigate is on the wrongdoer. The Claimant does not have to prove that she has mitigated the loss and tribunals are under no duty to consider the question of mitigation unless the employer raises it explicitly and adduces some evidence of a failure to mitigate. It is not enough for the Respondent to show that there were other reasonable steps that the Claimant could have taken but did not take. It must show that the employee acted unreasonably in not taking such steps.

13. In this case the Respondent did not produce any evidence about what other jobs the Claimant could have applied for. In relation to mitigation, I conclude that the Respondent has not discharged the burden. There was no documentary evidence showing what jobs she could have applied for (reasonable steps) nor was there evidence that the Claimant had acted unreasonably in not taking those steps. There was no challenge to the Claimant's evidence that the dismissal had caused her ongoing anxiety.

14. Having been off sick as a result of anxiety brought on by the manner in which the Respondent dismissed her and the dismissal itself, the Claimant unsuccessfully applied for permanent jobs. The Claimant then reached the reasonable conclusion that she would be better off in a locum position and reasonably got work as a practice nurse and vaccinator while keeping her days of work down due to her continued anxiety. I conclude that the Claimant did not act unreasonably in not taking more steps to mitigate her losses.

15. Section 123 of the Employment Rights Act 1996 says that I must award a compensatory award as I consider just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

16. The Respondent submits that the Claimant's losses should be limited to Statutory Sick Pay when she was signed off sick. This is rejected. It was the dismissal and way she was dismissed that caused the Claimant's illness and so had she not been dismissed she would not have been on sick leave during that time.

17. During the pandemic lockdowns the Claimant's locum hours were reduced. Mr McFarlane sought to argue that the Claimant, as a permanent employee at the Respondent, may have been furloughed. However, the Respondent provided no evidence to show how it had treated its staff over the lockdown periods, for example, whether they carried on operating as normal, whether the staff were placed on furlough or whether they were asked not to work with/without pay. In the absence of such evidence it would not be just nor equitable to reduce the award in these circumstances.

18. The Claimant's evidence in her witness statement and schedule of loss was that she would have carried on working for the Respondent doing the same hours until her mid – late 60s. This was unchallenged by the Respondent. However, I have found that the Claimant continued working her locum roles until the end of April 2022 when she moved to Merseyside because of the cost of living in London and to be near her daughter. The cost of living increases cannot be attributable to the Respondent, nor can the desire to be near her daughter. I therefore conclude that the Respondent ceases to be liable for unfairly dismissing the Claimant at the end of April 2022 as this is what I consider to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

19. The statutory cap of £42,900 (the Claimant's gross annual salary) applies to the compensatory award.

Employment Judge **L Burge**
Date 24 August 2022