EMPLOYMENT TRIBUNALS

Claimant: Miss D Trench

Respondent: Performance Bar Limited

Heard: in the Midlands (East) Region via CVP

On: 30 August 2022

Before: Employment Judge Ayre, sitting with members
Ms G Howdle
Mr J Purkis

Representatives:
Claimant: Ms R Jiggens, paralegal and academic
Respondent: Mr J Castle, counsel

JUDGMENT ON REMEDY

The unanimous judgment of the Tribunal is as follows:

1. The respondent is ordered to pay to the claimant the sum of **£3,031.04** in respect of her claim for unfair dismissal, made up as follows:

    a. **Basic Award:** **£182**

    b. **Compensatory Award:**

        i. Loss of earnings (including uplift): £2,549.04
        ii. Loss of statutory rights (including uplift): £300
        iii. **Total:** **£2,849.04**

Total award for unfair dismissal: £3,031.04

2. The Employment Protection (Recoupment of Jobseekers' Allowance and Income Support) Regulations 1996 apply to this award as follows:

a. Grand Total: £2,849.04
b. Prescribed Element: £2,549.04
c. Prescribed Period: 6 November 2020 to 16 May 2021
d. Excess of Grand Total over Prescribed Element: £300

REASONS

Background

1. In a judgment dated 5 June 2022 the Tribunal found that:

    a. the claimant had been unfairly dismissed;

    b. there should be no reduction from any compensation awarded to the claimant under the Polkey principles; and

    c. the claimant did not contribute to her dismissal.

2. The claimant's claims of victimisation and automatic unfair dismissal under section 103A were dismissed.

3. The case was listed for a remedy hearing today to decide what sum should be awarded to the claimant by way of compensation for the unfair dismissal.

The Proceedings

4. The remedy hearing took place via Cloud Video Platform ("**CVP**"). In advance of the hearing the claimant submitted a second remedy witness statement (the first having been provided at the time of the merits hearing in May 2022), an updated Schedule of Loss, a copy of the bundle of documents used at the final hearing, and an additional document comprising extracts from the respondent's Instagram account in June 2021.

5. The respondent submitted a brief witness statement for Ian Hughes, a skeleton argument and a number of authorities.

6. Neither the claimant nor Mr Hughes attended the hearing to give evidence. The Tribunal has however read their statements.

7. At 9.16 on the morning of the hearing Ms Jiggens wrote to the Tribunal indicating that the claimant was unable to attend the hearing until 12.30 due to mandatory training in her new role. She apologised for the late notice and explained that it was due to the system that she (Ms Jiggens) uses for confirming availability for CVP hearings.

8. The respondent objected to delaying the start of the hearing. The Tribunal heard submissions from both representatives on the issue and then retired to consider whether to delay the start of the hearing.

9. It was the unanimous decision of the Tribunal that the hearing should proceed in the absence of the claimant. It would not be proportionate

or in the interests of justice to delay the start. Notice of the remedy hearing was sent to the parties in June and that notice stated that the hearing would start at 10am. Ms Jiggens accepted that she had spoken to the claimant over the weekend to prepare her second remedy witness statement. Ms Jiggens wrote to the Tribunal the day before the hearing to submit documents but made no mention of the claimant's unavailability. She was unable to tell us when the claimant had become aware of today's training.

10. The Tribunal had to consider the interests of both parties, not just the claimant. The respondent was present and ready to go. It appeared to the Tribunal that not much would turn on the claimant's evidence – her witness statement was only one page and most of the issues would turn on submissions.

11. Ms Jiggens was given time to contact the claimant to take instructions as to whether, in light of the Tribunal's decision to proceed with the hearing, she wanted to reconsider whether to attend before 12.30. Ms Jiggens told us that she had not been able to speak to the claimant and was content for the hearing to proceed.

12. At the end of the hearing the Employment Judge gave judgment orally. She told the parties that written reasons would be provided, and that if there was any discrepancy between the written reasons and those provided orally, it was the written reasons that would take precedence.

Reconsideration of oral judgment

13. When giving judgment orally, the Employment Judge indicated that an award of £182 would be made by way of notice pay, in light of the agreement between the parties that that sum was due to the claimant.

14. Whilst preparing this written judgment the Employment Judge noticed that there is no free standing claim for breach of contract or notice pay before the Tribunal. As a result, the Tribunal cannot award a separate sum for notice pay. Rather, notice pay must form part of the unfair dismissal compensation.

15. The judgment given orally has therefore been reconsidered by the Tribunal on its own initiative, in accordance with Rule 73 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. It would, in the Tribunal's view, be in the interests of justice to reconsider the judgment to include compensation for notice pay as part of the compensatory award for unfair dismissal as there is no claim for notice pay before the Tribunal.

The issues

16. The parties had agreed the following in advance of the hearing:

    a. The claimant's gross and net weekly pay was £91;

    b. The claimant's basic award, given her age and gross weekly pay, was £182; and

c. The claimant was entitled to two weeks' notice pay totaling £182.

17. The issue that therefore fell to be decided by the Tribunal was what sum should be awarded to the claimant by way of unfair dismissal compensatory award, and in particular:

a. What period of loss should the claimant be compensated for and, in particular, did the claimant fail to mitigate her losses? The claimant argued that she should be compensated for loss of earnings from the date of termination of her employment until 17 May 2021 when she started another job and fully mitigated her losses. The respondent argued that the claimant had failed to mitigate her loss and could have obtained alternative employment within 5 weeks.

b. Should loss of earnings be calculated using the claimant's full pay or furlough pay of 80% of normal earnings?

c. What uplift, if any, should be applied under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("**TULRCA**") for any failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures ("**the Code**")?

Findings of Fact

18. The following findings of fact are made unanimously by the Tribunal, based upon the evidence before us today and at the merits hearing in May 2022.

19. The effective date of termination of the claimant's employment was 6 November 2021. At the time of her dismissal, she earned £91 a week from her employment with the respondent.

20. At the date her employment terminated the claimant had two years' continuous employment and was therefore entitled to two weeks' statutory notice. The respondent did not pay the claimant any notice pay.

21. The claimant was, at the time of her dismissal, a student. Bar work of the type that she had carried out with the respondent suited her because she could fit it in around her studies.

22. On 5 November 2020 the second national lockdown came into force. Non-essential businesses, including the respondent's bar, were closed. The respondent furloughed its staff on 80% of their normal pay. A third national lockdown began on 6 January 2021.

23. If the claimant had been furloughed by the respondent on 80% of normal pay, she would have received weekly pay of £72.80, equivalent to a daily rate of pay of £10.40.

24. Non-essential retail and hospitality venues were able to reopen on 12 April 2021.

25. The claimant and her partner received Universal Credit. The amount of Universal Credit varied, and there was no evidence before us today as to how the Universal Credit had been calculated.

26. Due to the Covid restrictions and the national lockdowns, it was a very difficult time to find bar work. On 13th April 2021 the claimant was interviewed for a job with a company called Carousel. After a period of training, she began working at Carousel on 17th May 2021. From 17th May onwards she was earning the same or more than she had earned whilst employed by the respondent.

The Law

Section 123 of the ERA states that:

> "*(1) Subject to the provisions of this section and sections 124, 124A 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 in so far as that loss is attributable to action taken by the employer….*
>
> *(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…"*

27. In ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*** the EAT held that there are three questions that a Tribunal should consider when dealing with allegations of failure to mitigate, and that the burden of proof is on the employer in respect of each:

    a. What steps was it reasonable for the claimant to take to mitigate her loss?

    b. Did the claimant take reasonable steps to mitigate her loss? And

    c. If the claimant had taken those steps, to what extent would she have mitigated her losses?

28. The starting point, when calculating the compensatory award, is that the Tribunal should assume that the claimant has taken all reasonable steps to mitigate. Mr Justice Langstaff, who was at the time President of the EAT, summarised a number of principles for Tribunals to apply when considering questions of mitigation, in the case of ***Cooper Contracting Ltd v Lindsey [2016] ICR D3***. Those principles include the following:

    a. The burden of proving a failure to mitigate lies with the employer;

b. If the employer does not adduce evidence that the claimant has failed to mitigate, the Tribunal is not obliged to look for such evidence or draw inferences;

c. The employer must prove that the claimant has acted unreasonably. The claimant does not have to establish that she acted reasonably;

d. Tribunals should not apply too demanding a standard on the claimant, and the claimant should not be 'put on trial' as if the losses were her fault;

e. It is for the 'wrongdoer' to show that the claimant has acted unreasonably by failing to mitigate her losses.

29. Section 207A of TULRCA provides that:

"*…(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –*

(a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) The employer has failed to comply with that Code in relation to that matter, and
(c) That failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%..."

30. A tribunal may only make an adjustment under section 207A if it makes an express finding that a failure to follow the Code was unreasonable (***Kuehne and Nagel Ltd v Cosgrove EAT 0165/13***). Not every breach of the Code or finding of unfair dismissal will warrant an adjustment. Similarly, a failure by an employer to follow its own disciplinary procedures will not necessarily mean that there has been a breach of the Code.

31. In ***Lawless v Print Plus EAT 0333/09*** Mr Justice Underhill, who was at the time President of the Employment Appeal Tribunal, suggested (albeit in the context of the former statutory disciplinary and grievance procedures) that relevant circumstances to be taken into account by a Tribunal when deciding whether to exercise its discretion and make an uplift, should always include whether:

a. The procedures were applied to some extent or were entirely ignored;

b. The failure to comply was inadvertent or deliberate; and

c. There were circumstances that mitigate the blameworthiness of the failure to comply.

32. The size and resources of the employer can also be a relevant factor.

33. More recently in the case of ***Slade and another v Biggs and others [2022] IRLR 216*** the EAT laid down a four stage test for Tribunals to follow when considering whether to make an uplift:

    a. Is the case such as to make it just and equitable to award an uplift?

    b. If so, what would be a just and equitable percentage uplift in all the circumstances?

    c. Does the uplift overlap with other general awards such as injury to feelings and, if so, what adjustment should be made to avoid double counting?

    d. Applying a final 'sense check', is the sum of money represented by the percentage uplift disproportionate in absolute terms and, if so, what further adjustment should be made?

34. The Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349 apply, inter alia, to compensatory awards covering immediate loss in unfair dismissal claims. They provide, in summary, that a Tribunal must first calculate the award without taking account of certain benefits including universal credit. Once the Tribunal has done this, it must then calculate:

    a. The total award to the claimant;

    b. The 'prescribed element' of the award, which is the claimant's loss up to the date upon which this decision is sent to the parties;

    c. The period covered by the prescribed element; and

    d. The amount, if any, by which the total award exceeds the prescribed element.

Conclusions

35. We reach the following conclusions on a unanimous basis, after considering the evidence, the legal principles set out above and the written and oral submissions of the parties, for which we are grateful.

36. The claimant was out of work from the 6 November 2020 until 16 May 2021, a period of just over six months. She fully mitigated her loss on 17 May 2021 and claims no losses from that time onwards. During the period that she was out of work the county was in two national lockdowns and most bars were closed.

37. The respondent has not adduced any evidence to suggest that there was work available that the claimant could have applied for and relies entirely on submissions in support of its argument that the claimant failed to mitigate her losses.

38. We have no hesitation in finding that the claimant did not fail to mitigate her losses. We accept the submissions of Ms Jiggens on this issue. The burden of proving that the claimant has failed to mitigate her losses lies with the respondent. The respondent has not discharged that burden.

39. It was, in our view, reasonable for the claimant, as a student, to look for work that would fit around her studying. She had done bar work for at least two years and it was understandable that she wanted to look for more work in bars. We accept her evidence that there was little work available – indeed the respondent's own evidence was that Trebles closed and staff were furloughed.

40. In the circumstances of the pandemic, the claimant's other commitments as a student, and her previous experience in bar work, it cannot be said that the claimant failed to mitigate her losses by looking for bar work rather than other work. We therefore find that the claimant did take reasonable steps after her dismissal to mitigate her losses. As a result the claimant should be compensated for the period beginning on 6 November 2020 and ending on 16 May 2021, the day before she started her new job.

41. We have then gone on to consider what rate of pay should be applied when calculating the claimant's losses, ie her normal rate of pay of £91 a week, or the 80% furlough rate of £72.80 a week.

42. In light of the national lockdowns, starting on 5 November 2020 and 6 January 2021, the date upon which bars were allowed to reopen, and of Ian Hughes' evidence that the respondent furloughed its staff, we find that the following rates of pay should be used when calculating the claimant's losses:

    a. £91 a week for the two-week notice period (6 – 19 November 2020 inclusive), as this was agreed by the parties;

    b. £72.80 a week for the period from 20 November 2020 (the end of the claimant's notice period) to 11 April 2021 (the day before bars were allowed to re-open); and

    c. £91 a week for the period from 12 April 2021 to 16 May 2021.

43. We have also considered carefully whether to apply an uplift in compensation under section 207A of TULRCA and, if so, what uplift to apply. In doing so, we have asked ourselves the questions laid down by the EAT in the recent ***Slade*** decision.

44. The first of those questions is whether it would be just and equitable to award an uplift. We find that it would be. The procedural failings in this case were significant. The respondent did not carry out any investigation other than the meeting with the claimant on 25 October 2020, despite telling her that it would do. The claimant was not told in advance of the meeting on 30 October at which she was dismissed what the grounds for disciplinary action were. The decision to dismiss

was taken before the meeting. The claimant was not offered the right of appeal.

45. The respondent failed to comply with the Code. It did not carry out a reasonable investigation. The same person carried out the investigation and the 'disciplinary' hearing. The claimant was not notified in writing of the disciplinary case to answer. The decision to dismiss was taken before the 'disciplinary hearing' on 30 October. The claimant was not offered the right of appeal.

46. The breaches of the Code were multiple and, whilst we take account of the fact that the respondent is a small employer with no dedicated HR function, it did have access to advice from a consultant and took advice from that consultant in relation to the claimant's dismissal. It was in our view unreasonable of the respondent not to comply with the Code when it had access to advice. The fact that it received poor advice from the consultant is a matter between the respondent and its advisor, and not one that the claimant should be penalised for.

47. We therefore find that the respondent unreasonably failed to comply with the Code and that it would be just and equitable to apply an uplift under section 207A.

48. We have then considered the second of the ***Slade*** tests, namely what would be a just and equitable uplift in all the circumstances. We've asked ourselves the questions contained within ***Lawless***:

    a. Was the Code applied to some extent or entirely ignored? We find that it was not entirely ignored, although the failings were substantial. The respondent did interview the claimant about the events for which she was dismissed, took advice on the situation, invited the claimant to a second meeting and took notes of both meetings. It cannot be said that this was a case in which the respondent made no attempt at a fair procedure.

    b. Was the failure to comply inadvertent or deliberate? We found Mr Hughes in particular to be a credible witness. We do not believe that he deliberately set out to dismiss the claimant without following a fair procedure. Rather he was ignorant of the correct procedure to follow and relied upon bad advice from the consultant. The procedural failings were therefore largely inadvertent.

    c. Were there circumstances that mitigate the blameworthiness of the failure to comply? We find that there were not. We recognise that the respondent is a small employer, but it had access to advice and indeed took advice.

49. In light of the above, and in particular of the number of breaches of the Code, we consider that an uplift towards the upper end of the scale is appropriate. We find that it would be just and equitable to award an uplift of 20%.

50. Turning now to the final two ***Slade*** tests, it cannot be said that the uplift overlaps with other general awards as no such awards are made. The amount of the uplift, as calculated below, is £474.84. It is a small amount in absolute terms and is not disproportionate.

51. We therefore calculate the compensatory award to the claimant as follows:

    a. Loss of earnings from 6 – 19 November 2020 (the notice period):

       2 weeks @ 91 a week: £182

    b. Loss of earnings from 20 November 2020 to 11 April 2021, a total of 20 weeks and 3 days at a weekly rate of £72.80 and a daily rate of £10.40:

       20 weeks @ 72.80 = £1,456
       3 days @ 10.40 = £31.20
       Total: £1,487.20

    c. Loss of earnings from 12 April 2021 to 16 May 2021, a total of 5 weeks:

       5 weeks @ 91 a week = £455

    d. Total loss of earnings (adding the figures in sub paragraphs a, b and c above): **£2,124.20**

    e. In addition to loss of earnings, the claimant is also entitled to a payment to compensate her for the loss of her statutory rights. The claimant was a relatively low earner who only just acquired two years' service when she was dismissed. We therefore find that an award at the lower end of the scale is appropriate and award the claimant £250 for loss of statutory rights.

    f. Adding the compensation for loss of statutory rights to the loss of earnings gives £2,374.20.

    g. We have then applied the 20% uplift to this figure. This increases the compensatory award by £474.84, resulting in a total compensatory award of **£2,849.04.**

52. The respondent is therefore ordered to pay the following sums to the claimant:

    a. A Basic Award of **£182**
    b. A Compensatory Award of **£2,849.09**

    Resulting in a total award to the claimant of **£3,031.04**.

53. The compensatory award is subject to the application of the Employment Protection (Recoupment of Benefits) Regulations.

Employment Judge Ayre

1 September 2022