



EMPLOYMENT TRIBUNALS

Claimant

Miss Traci-Gail Sayer

v

Respondent

Alliance Point Limited

Heard at: Norwich

On: 6 July 2022

Before: Employment Judge M Warren (sitting alone)

Appearances:

For the Claimant: Mr Stevens, Solicitor

For the Respondent: Mr T Garande, Operations Manager

JUDGMENT having been sent to the parties on 26 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. This is a Remedy Hearing arranged as a consequence of Judgment being entered for Miss Sayer by me on 25 November 2021, the time for presenting a Response from the Respondents having expired.
2. On the Tribunal file we have correspondence from the Respondents saying that they had not received the Claim Form, this is as a consequence of their receiving the Notice of Remedy Hearing dated 5 February 2022. That correspondence was received by email on 26 May 2022.
3. At my direction a letter was written to the Respondents. My instructions were given on 13 June 2022, the letter was written on 29 June 2022, explaining that if they wished to apply for a reconsideration of the Judgment they would have to complete and return an ET3 Response Form together with an Application for an extension of time explaining why the Response was late.

4. In fairness I record that Mr Garande, the Operations Manager for the Respondent who has attended today, has told me after the hearing and just before I gave Judgment, that the ET3 Response form has been submitted and they have an electronic acknowledgement of that. However, the Response and any Application for an extension of time is not before me. I am therefore required to proceed, giving the Claimant our decision on the matter of Remedy. Whether or not there is an Application for Reconsideration to be dealt with in the future remains to be seen. As things stand, I must deal with what is before me.
5. As an addendum, I add that as at 4 November 2022, there is not ET3 nor an application for an extension of time on the file.
6. Mr Garande has attended today on behalf of the Respondents. I have allowed him to make submissions and to ask questions of Miss Sayer, as it seemed to me to be right and fair that I should do so. I have of course limited my consideration to matters that go to the question of remedy, on the basis that the issue of liability has already been decided in the November 2021 Judgment.
7. I had before me today a Witness Statement from Miss Sayer and a bundle prepared by her solicitors, for which I am grateful. Miss Sayer gave oral evidence, she answered some questions from me and she answered some questions from Mr Garande. She confirmed in her evidence that the contents of her Schedule of Loss and her statement were true.
8. My decision on Remedy is as follows along with the essential findings of fact.

The Law

Compensation for unfair dismissal

9. When a Claimant has succeeded in a claim for unfair dismissal, the award of compensation falls into two categories. The first is in respect of a Basic Award pursuant to sections 119 to 122 of the Employment Rights Act 1996 (ERA) which provide that in the case of an ex-employee aged over 41, the Basic Award shall be a multiple of one and half times the number of years' complete service and the individual's gross pay, (subject to a statutory maximum which has no bearing in this case). For service aged 41 and less, the multiplicand is one times a week's pay.
10. The second element of the award is to compensate the Claimant for losses sustained as a result of the dismissal, known as the Compensatory Award. The amount of such an award is governed by sections 123 to 126 of the ERA. Section 123 (1) states:

“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 insofar as that loss is attributable to any action taken by the employer.”

11. Section 123 (4) provides that a Claimant has the same duty to mitigate her loss as would a Claimant under the common law.
12. By an amendment to the Trade Union and Labour Relations (Consolidation) Act 1992 at section 207A, where in a case of unfair dismissal, it appears that a relevant code of practice applies, the employer has failed to comply with that code and that failure was unreasonable, then the Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the award by up to 25%. The only ACAS code of practice to which that provision relates is the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2009) which sets out recommendations as to how an employer should handle cases of disciplinary issues and how to handle a grievance which has been raised by an employee.
13. Section 124 (1ZA) limits the amount of compensation that may be awarded for unfair dismissal to the lower of 52 week's gross pay or a specified figure which is changed annually, (currently £86,444). This is known as the Statutory Cap.

Holiday Pay

14. The relevant law is contained in the Working Time Regulations 1998.
15. Regulations 13 and 13A provide together for a requirement that employers must allow workers a minimum of 5.6 weeks paid holiday per year. That is 28 days holiday for a full time worker.
16. Pursuant to regulation 14, a payment in lieu of untaken leave entitlement must be paid on termination of employment if the paid holiday taken is less than the accrued entitlement as at the date employment terminated.
17. Regulation 13(9)(a) provides that leave must be taken in the leave year in which it accrues due.

Notice

18. Section 86 of the ERA entitles an employee to one week's notice for each complete years' service.

Findings of Fact

19. The Claimant's date of birth is 18 August 1963; she was therefore aged 57 at the time her employment came to an end. Her employment began on 1 September 2010. I gather from evidence I have heard today that she has been employed by a number of entities since that time. The Transfer of Undertaking Regulations will have applied. Her employment was terminated on 22 July 2021, she therefore had 10 years complete service.
20. Her gross annual salary was £9,035; her monthly gross was £752.92; her weekly gross £173.75 and her net weekly pay the same. There were copy pay slips in the bundle.

21. In her Witness Statement, Miss Sayer referred at paragraph 2 to not having been able to look for alternative work because of ongoing health issues suffered by her partner, which she went on to explain.
22. This prompted the question from me, that if she was unable to look for alternative work now because of her partner's ill health, presumably she would have had the same problem continuing in the employment of the Respondent.
23. She explained that she has a son and step son at home, (they are adults) and that the service user that she used to attend to as a carer on behalf of the Respondent lived relatively nearby. She says that she would have been able to make arrangements with the Respondent to deal with the changing needs of her partner and a change in employment in relation to her son, who otherwise provided care when she was away looking after the service user.
24. My finding is that Miss Sayer could have found other work as a carer elsewhere with similar arrangements to those that she had in place with the Respondent, working early in the morning and in the afternoons, eventually if she had tried.
25. Whereas her Schedule of Loss claims for loss of earnings to date and for a further 26 weeks from now, I find that she should by now have found alternative work to make up for what she would have been earning with the Respondent. My finding therefore is that her losses cease as of today.
26. The calculations, therefore, are unfair dismissal basic award:
 - $15 \times \pounds 173.75 = \pounds 2,606.25$
27. Her losses to date are:
 - $\pounds 173.75 \times 50 = \pounds 8,687.50$
28. I award her for loss of statutory rights:
 - $\pounds 500$ as claimed.
29. The total compensatory award would therefore be: $\pounds 9,187.50$ but I apply the statutory cap for unfair dismissal compensatory awards and that is:
 - $\pounds 173.75 \times 52 = \pounds 9,035.00$
30. The circumstances of Miss Sayer's dismissal were that there was no compliance at all with the ACAS Code of Practice and I therefore find it just and equitable to uplift the award by 25%, which is:
 - $\pounds 2,258.75$

31. The total unfair dismissal award is therefore:
- £13,900.00
32. In respect of notice pay, Miss Sayer was dismissed without notice and she was entitled to 10 weeks' notice, therefore her notice pay should be:
- £1,737.50
33. In respect of holiday pay, in the Schedule of Loss she claims for two years of holiday pay. The fact of the matter is that holiday can only be claimed for the holiday year in which the date of termination takes place, because it must be taken during the holiday year. Although Miss Sayer told us today that she has a Contract of Employment, I do not have it in front of me and she did not have a copy with her. She was uncertain as to the holiday year. I find therefore, that the holiday year commenced from the date her employment commenced, 1 September.
34. That means that by 22 July 2021 when her employment was terminated, in that year she had accrued 10 twelfths of her annual entitlement, which is reduced on a pro-rata basis as set out in the Schedule of Loss as 2.95 weeks. The calculation is therefore:
- $2.95 \times 10 \div 12 \times 173.75 = £427.13$
(holiday pay accrued due but not paid)
35. On the subject of holiday pay, I should record that Mr Garande submitted and questioned Miss Sayer on the basis that, we worked out, she received 'rolled up' holiday pay. Rolled up holiday pay is of course contrary to the law, but it is acknowledged that any rolled up holiday pay received by a claimant should be set off against their entitlement, provided that it is clearly identified. I do not have a contract before me that sets out any provision as to rolled up holiday pay and I noted as it was pointed out by Mr Stevens, there was no reference to holiday pay being rolled up in the copy pay slips in the Bundle. Any such rolled up pay is not clearly identified. I find that there was none.
36. The total award is, therefore, to recap:
- Unfair dismissal: £13,900.00
 - Notice pay: £ 1,737.50
 - Holiday pay: £ 427.13
- Grand Total: £16,064.63**
37. The recoupment provisions will apply as Miss Sayer was in receipt of Benefits.

Delay in producing these reasons

38. These reasons were given orally on 6 July 2022. A request for written reasons was received from the respondent on 31 July 2022 but not

referred to me until 16 September 2022. I requested that the recording of these reasons be typed on 16 September 2022. Because of a shortage of typing facilities at the tribunal, they were not produced for me to correct until 2 November 2022. I have corrected them and signed them off as quickly as possible.

Employment Judge M Warren

Date: 4 November 2022

Judgment sent to the parties on

11 November 2022

For the Tribunal office