



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Barbara Tyler

**Respondent:** Mr Paul Orkin

**Heard at:** Watford ET (by video)      **On:** 6 December 2022

**Before:** Tribunal Judge Overton sitting in the Employment Tribunal

## Representation

**Claimant:** Ms Bull, Simpsons Solicitors

**Respondent:** in person

# JUDGMENT ON REMEDY

The judgment of the Tribunal is that the Respondent shall pay to the Claimant compensation for unfair dismissal totalling **£1,583.74**.

This is made up of (i) a basic award of **£656.25** and (ii) a compensatory award comprising an award for loss of earnings post dismissal of **£683.32** and **£200** compensation for loss of statutory rights, both of which are subject to an uplift of **5%** for unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, giving a total compensatory award of **£1,583.74**

In addition, the Respondent shall pay to the Claimant the sum of **£341.66** net for unpaid notice pay and **£713.63** gross (to be paid after deduction of tax and national insurance) in holiday pay for accrued, untaken holiday.

# REASONS

1. By a judgment sent to the parties on 29 November 2022 I upheld the Claimant's claim for unfair dismissal and decided that no Polkey reduction applied as the misconduct alleged against Ms Tyler would not have resulted in dismissal even if a fair procedure had been followed. Ms Tyler's claims of wrongful dismissal/breach of contract and breach of the Working Time Regulations 1998 were also well-founded.

## Issues

2. The issues for this hearing were agreed to be as follows:

- (a) What financial losses has the dismissal caused the claimant?
- (b) Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- (c) If not, for what period of loss should the claimant be compensated?
- (d) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- (e) Did the respondent or the claimant unreasonably fail to comply with it?
- (f) If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- (g) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- (h) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- (i) Does the statutory cap apply?

3. What basic award is payable to the claimant, if any?

4. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

5. What is the Claimant owed in notice pay and holiday pay?

## Financial loss

6. At the date of termination, Ms Tyler earned £12.50 per hour when working for Mr Orkin. She worked an average of 17.5 hours per week and earned an average of £218.75 gross per week and £170.83 net per week.

7. Ms Tyler's employment was terminated without notice on 8 September 2021. Ms Tyler agreed that she started work for Mr Orkin on 2 November 2018 and therefore she had worked continuously for two full years. She was therefore entitled to 2 weeks' notice of termination which would have expired on 21 September 2021.

8. Ms Tyler commenced new employment on 1 December 2021 at a lower hourly rate and for a reduced number of hours.

## Mitigation of loss

9. I heard oral evidence from the Claimant regarding her post-dismissal losses and mitigation of loss. Her evidence, and my conclusions in the light of it, are as follows:-

The Claimant's evidence:

10. While working for Mr Orkin, Ms Tyler also worked full-time at a school. She worked for Mr Orkin at the weekends. In the summer of 2021 Ms Tyler moved house to some 90 minutes' drive away from her workplace with Mr Orkin. She left her full-time school role near her old address and started full-time employment at a school near her new home. This job started on 1 September 2021.

11. On around 22 August 2021 the Claimant sent Mr Orkin a WhatsApp message to say that she had things going on at home and that she wouldn't be able to work the next two weekends and that after that period, she would 'see what the situation is'. Ms Tyler gave evidence that she had sent another message to Mr Orkin to let him know that she was ready to return and to agree a suitable return date but no documentary evidence of that message was produced and Ms Tyler was confused about the date of this message and whether the message was sent to Mr Orkin before or after her termination.

12. Ms Tyler stated that she intended to return to work for Mr Orkin and that the WhatsApp message of 22 August 2021 did not reflect a possibility that she would not return to work.

13. Ms Tyler received a WhatsApp message terminating her employment on 8 September 2021 and she responded to the message that same day. The documents in the bundle indicated that on 15 September 2021 Ms Tyler contacted Mr Orkin to express her disbelief at her dismissal and Mr Orkin replied indicating a willingness to talk about matters as Ms Tyler's replacement had not started work yet. Ms Tyler tried to contact Mr Orkin to have this conversation but Mr Orkin did not take her calls or respond to her.

14. Ms Tyler gave oral evidence that in the period between the termination of her employment with Mr Orkin and starting her new caring job on 1 December 2021, she was waiting to discuss matters with Mr Orkin as she hoped to return to work for him. She also said that she was looking for other caring roles during that period although, in contrast, she also said that she had opted to take some time to settle into her new school job before starting to look for a new caring job. She started a new caring role when a colleague at school approached her and recommended a family to her; she had not actively looked for and applied for any roles before this. Ms Tyler started her new caring role at a location close to her new home address on 1st December 2021.

15. In my judgment it was appropriate for Ms Tyler to wait some time to explore the possibility of returning to work for Mr Orkin, since he had suggested this possibility. However, after 4 weeks from the date of dismissal, with Mr Orkin failing to return her calls, Ms Tyler would have been aware that a return to work for Mr Orkin was very unlikely and she should have started looking for work after that time. As an experienced carer, in my judgment Ms Tyler would have found a new job within 2 weeks, if not in a permanent role then through an agency.

16. As Ms Tyler has provided evidence of jobs available in Northamptonshire only, I conclude that Ms Tyler has chosen the convenience of a local job over the higher pay of a more distant area (such as the area where Mr Orkin lives) and therefore Mr Orkin is not responsible for any ongoing loss.

17. I find that Ms Tyler should have fully mitigated her loss by 20 October 2021, six weeks after the termination of her employment (or four weeks from the end of the two week notice period she should have received).

## **ACAS Code**

18. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that 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%”.

19. Mr Orkin failed to comply with any aspect of the ACAS Disciplinary Code. I find it just and equitable to apply a 5% increase to the compensatory award payable to Ms Tyler. I acknowledge that Mr Orkin is an employer out of necessity rather than choice and that he is reluctantly in the position of employing carers because his local council will no longer fulfil the role of employer. However, a level of increase is appropriate as Mr Orkin had not attempted to apply any degree of fairness to the situation and to deprive someone of their job and potentially a means of livelihood is obviously a very serious step and one that needs to be approached fairly. I note that Ms Tyler’s contract of employment, co-signed by Mr Orkin, gives details of the disciplinary process that Mr Orkin should have undertaken and therefore he was or ought to have been aware that there was a disciplinary procedure to be considered and applied.

### **Contributory conduct of Ms Tyler**

20. Section 122(2) ERA 1996 provides that:

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

21. Section 123(6) further provides:

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.

22. I find that Ms Tyler’s conduct did not cause or contribute to her dismissal and there was no conduct which would make it just and equitable to reduce the basic award or the compensatory award.

23. Although Mr Orkin referred to alleged misconduct in Ms Tyler submitting her invoice directly to Pay Packet (the payroll organisation) before Mr Orkin had received the money from the Council to cover his care costs, this was done in the context of a history of delayed payments by Pay Packet, the invoice being submitted before Mr Orkin had indicated that Ms Tyler should not submit the invoice directly, Pay Packet issuing the payment against their own protocols and Ms Tyler being under the impression that her email to Pay Packet with the invoice attached had, in fact, failed to send.

### **Basic Award**

24. Based on the payslips I was shown, the Claimant was paid an average of £218.75 per week gross pay over the last 12 weeks of employment for which I have information. Taking into account s 224 ERA 1996, that appears to me to be the correct figure to take for gross weekly pay. That means that the Basic Award is 1.5 (because the Claimant was over 41 years of age) x £218.75 x 2 (one week for each full year of employment) = £656.25.

### **Compensatory Award**

25. In order to avoid double-counting, I must take account of the notice of termination which Ms Tyler should have received. The compensatory award will therefore start from 22 September 2021. The award for loss of earnings is £170.83 x 4 weeks = £683.32 net. In addition I award £200 for loss of statutory rights. Ms Tyler had been employed by Mr Orkin less than 3 years and her move to Northampton made it significantly likely that she would have voluntarily left Mr Orkin's employment in the short term, to work closer to home. That gives a total of £883.32.

26. The ACAS uplift applies to the compensatory award and the total compensatory award is therefore £883.32 + 5% = £927.49.

### **Recoupment**

27. Ms Tyler did not claim benefits following her dismissal by Mr Orkin. Recoupment is therefore not an issue.

### **Holiday pay**

28. The parties agreed that Ms Tyler had accrued 57.09 hours of untaken holiday. 57.09 x £12.50 = £713.63 gross. The net amount is to be paid to Ms Tyler.

### **Wrongful Dismissal**

29. Ms Tyler was entitled to two weeks' notice of termination under her contract of employment and in line with section 86 of the ERA 1996. As Ms Tyler was not guilty of misconduct for which Mr Orkin was entitled to dismiss without notice, Ms Tyler is entitled to 2 x £170.83 = £341.66 net.

30. Ms Tyler's compensatory award and compensation for unfair dismissal must therefore be calculated from the end of Ms Tyler's notice period to avoid double-counting.

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Tribunal Judge Overton sitting in the Employment  
Tribunal

Date: 3/2/2023

JUDGMENT SENT TO THE PARTIES ON: 7/2/2023

NG - FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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1. Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.