



EMPLOYMENT TRIBUNALS

Claimant

Ms Renata Kowalczyk

v

Respondent

DHL Aviation (UK) Ltd

Heard at: Watford by CVP

On: 27 January 2023

Before: Employment Judge Allen sitting with Ms Williams and Ms Hartland

Representation

For the Claimant: Mr Gracka,

For the Respondent: Ms Kaye of counsel

RESERVED REMEDY JUDGMENT

1. The Respondent will pay the claimant a basic award of £1,010.28 gross. The basic award is subject to tax under S401 Income Tax (Earnings and Pensions) Act 2003.

2. Findings

2.1. Payments at Effective Date of Termination (EDT) 15 August 2020.

2.1.1. The claimant's basic salary and working hours were no longer as set out in her original contract of employment dated 13 September 2017.

2.1.2. At the time of dismissal, the claimant earned a basic salary of £17,373.96 gross for 33 hours per week or £334.11 per week gross.

2.1.3. The contract of employment (commencing page 32 of the bundle) includes a provision for an unsocial hours' payment (page 33) which states:

If your contracted hours of work do fall within the company's definition of unsocial hours You will receive shift payments as per open option per month as an unsocial hours' payment. This payment is made one month in arrears. Should your hours of work change then the amount of/entitlement to unsocial hours pay may change. The payment is not part of your basic salary and is not subject to any annual increment.

- 2.1.4. At commencement the claimant was contracted to work:
Tuesday - Thursday [2am - 9am] and Friday [4 am - 9am]
with 1 hour's unpaid break per shift (22 hours).
- 2.1.5. At EDT the claimant's hours had been extended to 33 hours per week including weekend shifts and would attract a weekend premium payment for those when she worked them.
- 2.1.6. 3 pay advices were supplied by the respondent dated 25 June, 25 July and 25 August 2020. They show unsocial hours and weekend premium payments.
- 2.1.7. The weekend premium payment is not mentioned in the contract. The pay advices show the weekend premium was added to the pay advice automatically and then deducted because the claimant was on long term sickness absence and not working those weekend shifts.
- 2.1.8. The unsocial hours premium is provided for under the contract and does appear on the 25 June 2020 pay advice. It was not deducted in the same way as the weekend premium notwithstanding the claimant's sickness absence. On that pay advice the claimant received £11.50 (2.30 x 5) (£2.30 x 5 shifts). This equates to an additional payment of £2.65 per week (£11.50 x 12 months /52 weeks).
- 2.1.9. £334.11 gross weekly salary plus £2.65 weekly unsocial hours' allowance brings the gross weekly salary to £336.76 and the tribunal bases its calculations on that figure.
- 2.1.10. The 25 August 2020 pay advice; the final pay advice; includes payments for :
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|----------------------------------|----------|
| salary, | £723.91 |
| accrued holiday entitlement, and | £571.78 |
| payment in lieu of notice. | £1593.64 |

3. Compensatory Award

- 3.1. We concluded the dismissal fell outside the range of responses a reasonable employer may have adopted in the circumstances existing at the time of dismissal. Given the claimant was certified unfit to work until 7 September 2020 and her manager had instructed her not to return to work until her doctor certified her fit to do so we found that the dismissal was premature. In addition, the respondent had failed to communicate key information about the office-based vacancies, including that lack of experience was not a bar to her application being successful and that training would be provided to her if she was, had that been done the claimant could have applied for an office-based role and returned to work.
- 3.2. Future losses. The tribunal must calculate those losses based on the circumstances of the claimant had the unlawful act not occurred, with the circumstances in which they continued to find themselves including age and health. In this instance the claimant was 47 years of age at EDT and 49 at the remedy hearing. She continues to use an inhaler for her asthma but tells us she

is much better and self-employed in the business she has been operating since 2016.

3.3. The tribunal is required to assess certain scenarios:

3.3.1. Would the claimant have remained employed;

3.3.1.1. We heard that the claimant continued to be unfit for work for some time after her dismissal. She told us she applied for disability status from the Department of Work and Pensions (DWP), she did not say if she was successful. Had the claimant been successful in her claim for disability status we conclude it is more likely than not she would have said so during the hearing since she could have relied upon it in her claim that she was discriminated against.

3.3.1.2. We concluded the claimant would have remained employed. Certainly, up until 7 September 2020 when her GP's certificate expired.

3.3.1.3. The claimant has not sought to provide any evidence as to when she would have been fit to return to work if at all. We have heard evidence today that the claimant's asthma is very much better although she still uses an inhaler. During the hearing in March 2022 we heard her asthma greatly improved away from the workplace.

3.3.1.4. It should be noted the NHS had written to her that she could return to work in a covid safe environment as of 1 August 2020 and that the medical evidence, such as it was, was that she could work in an office. We also heard that she was working from home in her own business.

3.3.1.5. There is insufficient evidence upon which we could form an opinion upon when or if the claimant would ever be able to return to work for the respondent as a warehouse operative.

3.3.2. Would she have been dismissed in any event;

3.3.2.1. We found that the respondent intended to dismiss the claimant for capacity and that dismissing her before her certificate expired was premature. She would however, have been dismissed had she not returned to work as a warehouse operative.

3.3.3. Would she have found equivalent employment

3.3.3.1. We heard evidence that the claimant did not seek alternative employment after her dismissal. She chose instead to develop her own business which she had been working on since 2016.

3.3.4. Would she have suffered the same difficulties as she is currently experiencing

3.3.4.1. From the business accounts provided by the claimant we can see that the her own business generated **£19,978** in revenue as a self-employed McKenzie friend in the 12 months following EDT. We can also see the claimant claimed in excess of **£12,405** in deductions from HMRC and that her income was in fact **£7,573**. No evidence was presented to us to support those deductions and we felt **£5,089** for materials and **£4,000** for rent, insurance and property costs was exaggerated. Given the business had been

running since 2016, was largely filling in forms on line and operated from home **£3,316** was more credible although again unsupported by documentation. [£3,316 is the remainder of the deductions claimed which covered stationary etc., allowable business expenses, travel, accountancy and professional fees].

3.3.4.2. We find that the claimant's income in the 12 months following EDT was **£16,662** gross.

3.3.5. Might she have been promoted and received higher pay

3.3.5.1. Since the claimant was self-employed her business could certainly have gone on to generate higher revenues depending on the claimant's efforts and business acumen.

3.3.6. When will the claimant obtain equivalent remuneration

3.3.6.1. In the 12 months following EDT the claimant generated revenue of £19,978 gross which was in fact higher than her gross salary with the respondent.

3.3.6.2. The claimant did not provide accounts for the tax year ending 5 April 2022 but given the substantial revenue generated in the 12 months following EDT the tribunal has no trouble concluding the claimant was capable of producing equivalent remuneration in that year.

3.4. Loss flowing from the dismissal (*For example, if the claimant would only have been paid sick pay as a result of a condition unrelated to the dismissal. - Royal Bank of Scotland versus O'Doherty. UKEAT/0307/ 14/ RN*).

3.4.1. At EDT the claimant was on CSP of £334.11 + £2.65 contractual unsocial hours premium = £ 336.76. The respondent's sickness policy provides for 26 weeks CSP. When CSP comes to an end the respondent gave evidence it is their practice to stop paying the employee; to notify them and DWP. DWP will then pay Statutory Sick Pay of £95.85 for a further 28 weeks. The claimant had been on sickness absence from 28 February 2020 until EDT on 15 August 2020. 24 weeks and 1 day. Company sick pay would have come to an end on Friday 28 August 2020.

3.4.2. CSP of **£673.25**

3.4.3. The claimant's income would then have been reduced to the statutory sick pay amount of £95.85 per week in 2020. 12 weeks x £95.85 = **£2,683**.

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| Commencement | 18/09/2017 |
| Effective date of termination | 15/08/2020 |
| Period of continuous service - 2 years, 10 months 28 days | |
| Age at EDT DoB 15/3/1973 | 47 |
| Remedy hearing date (cutoff date for future loss of earnings) | 27/01/2023 |
| Contractual notice period 1 week for each year of employment - | 2 weeks |
| Statutory notice 1 week for each year of employment - | 2 weeks |
| Gross weekly pay at EDT (inclusive of contractual unsocial hours allowance of £2.65 per week) | |
| (£334.11 per week + £2.65 = £336.76) | £336.76 |
| Gross annual salary (including unsocial hours premium) | £17,511.52 |

Basic award

number of qualifying weeks times gross weekly pay

2 x £336.76 x 1.5 (the claimant being over 41)

Total basic award **£1,010.28****Compensatory award (immediate loss)**

loss of earnings:

Company Sick Pay between EDT 15/8/'20 - 28/8/'20 **£673.25**12 weeks SSP at £95.85 per week between 31/8/'20 - 20/11/'20 **£2,683**plus loss of statutory rights **£250**less payment in lieu **£1,593.64**less earnings: (date of commencement at new job - date of remedy hearing) 1/9/20-31/8/21 **£16,662****Total Compensatory Award** **£0****Adjustments to total compensatory award**failure by employer to follow statutory procedures at 25% **£0****Total adjustments to the compensatory award****Compensatory award after adjustments** **£0**

Case Number: **3311942/2020**

Summary totals

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|--------------------|------------------|
| basic award | £1,010.28 |
| compensation award | £0 |
| Total | £1,010.28 |

Employment Judge Allen

Date:29/3/2023

Sent to the parties on: 29/3/2023

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For the Tribunal Office