



EMPLOYMENT TRIBUNALS

Claimant: Rachel March

Respondents: 1) Whipcot Developments Limited
2) Whipcott Getaways Limited

Heard at: Bristol **On:** 07 June 2023

Before: Employment Judge Gray-Jones

Representation

Claimant: In person

Respondent: Mr Michael Gallagher, Director, for the First Respondent
Mr Jimmy Lee, Director, for the Second Respondent

RESERVED JUDGMENT ON REMEDY

The Second Respondent shall pay the Claimant the following sums by way of remedy:

1. A basic award of **£1954.05**.
2. A compensatory award comprising of **£300** for loss of statutory rights.
3. An award for wrongful dismissal of **£404.91**.
4. There will be an uplift of 15% to the compensatory award and the award for wrongful dismissal for the Second Respondent's failure to comply with the ACAS Code on Discipline and Grievances. This amounts to **£105.74**.
5. There is an award of **£260.54** under s.38 of the Employment Act 2002 to reflect the failure to issue the Claimant with a statement of employment particulars.
6. The total award is therefore **£3025.24**.
7. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply to this award.

REASONS

1. After the judgment on liability was given to the parties the Tribunal heard evidence and submissions in relation to remedy. The Claimant gave evidence in relation to her Schedule of Loss and the representatives of both Respondents were given the opportunity to ask questions. The Tribunal also asked questions in order to seek clarification of some of the losses claimed. All parties were given the opportunity to make submissions. After evidence and submissions there was insufficient time to give a judgment on remedy, and it was agreed that judgment would be provided in writing.
2. The Claimant commenced employment with the Respondent in 2009. She was aged 47 at the date of her dismissal and had 12 years' continuous employment.
3. In her Schedule of Loss the Claimant stated that her gross weekly wage was £130.27. The Respondents disputed this on the basis that it produced a pay rate which exceeded the Claimant's normal weekly hours at the date of dismissal.
4. I accept the Claimant's evidence that there was some variation in her hours and that she did laundry work in addition to her normal cleaning duties. I have also checked the figure in the Claimant's schedule of loss against her earnings with the First Respondent recorded in her P45 and find that the figure claimed for weekly earnings in the Schedule of Loss is consistent with the figure in the P45. Doing the best I can with the materials available to me I find that her gross weekly earnings with the First Respondent were £130.27.
5. It was not disputed that the Claimant was dismissed without notice of pay in lieu of notice. There was no written agreement in relation to notice and so her entitlement to notice is under s.86 Employment Rights Act 1996 ("ERA 1996") and is 12 weeks.
6. The Claimant lost earnings over a period of 12 weeks as a result of her dismissal but was able to mitigate her loss to an extent by increasing her earnings from self-employment. The figure for loss of earnings in her Schedule of Loss was £404.91. There was no challenge to this figure from the Respondents.
7. It was not disputed that at no point during her employment with the First Respondent or the Second Respondent was the Claimant issued with a statement of particulars of employment as required under ss.1 - 4 ERA 1996.
8. Following her dismissal, the Claimant submitted a written grievance to the Second Respondent. The grievance was sent on 17 January 2022. The grievance complained about her dismissal but also raised other matters including a failure to consult with her in relation to the transfer and make payments due to her on termination of employment. I am satisfied, having seen proof of recorded delivery, that the grievance was delivered to the Second Respondent. The Second Respondent did not respond to the

grievance in any way.

The Relevant Law

9. Under s.118 ERA1996 where an employment tribunal makes an award of compensation for unfair dismissal the award will comprise of a basic award and a compensatory award.
10. The basic award is calculated in accordance with s.119(1) - (2) ERA 1996 which provides that the amount of the award shall be calculated by:
 - a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*
 - (b)reckoning backwards from the end of that period the number of years of employment falling within that period, and*
 - (c)allowing the appropriate amount for each of those years of employment.*

(2) In subsection (1)(c) “the appropriate amount” means—

 - (a)one and a half weeks’ pay for a year of employment in which the employee was not below the age of forty-one,*
 - (b)one week’s pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and*
 - (c)half a week’s pay for a year of employment not within paragraph (a) or (b).*
11. The compensatory award is calculated in accordance with s.123 ERA 1996 which provides at s.123(1) that the amount of the compensatory award shall be such sum as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal insofar as it is attributable to action taken by the employer.
12. Under s.207A Trade Union & Labour Relations (Consolidation) Act 1992 in any claim under any of the jurisdictions listed in Schedule A2, which includes claims for unfair dismissal and wrongful dismissal, where it appears to an employment tribunal that the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies and the employer has unreasonably failed to comply with the Code, the tribunal may if it considers it just and equitable in all the circumstances to do so, increase any award it makes to an employee by up to 25%.
13. In **Slade and anor v Biggs and ors [2022] IRLR 216** the EAT set out a four-stage test to assist in assessing an appropriate uplift:
 - 1) Is the case such as it makes it just and equitable to award any ACAS uplift?
 - 2) If so, what does the tribunal consider a just and equitable percentage, not exceeding, although possibly equalling, 25 per cent?
 - 3) Does the uplift overlap or potentially overlap, with other general awards, such as injury to feelings in discrimination claims? If so,

what in the tribunal's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

- 4) Applying a "final sense-check", is the sum of money represented by the application of the percentage uplift arrived at by the tribunal disproportionate in absolute terms? If so, what further adjustment needs to be made?

14. Under s.38 Employment Act 2002, where an employment tribunal upholds a complaint in any of the jurisdictions listed in Schedule 5, which includes claims for unfair dismissal and breach of contract, and makes an award to an employee, and if finds, when the proceedings were begun that the employer was in breach of its duty to provide a statement of employment particulars under ss.1 - 4 ERA 1996 it must, unless there are exceptional circumstances which would make an award unjust or inequitable, award the minimum amount of two weeks' pay and may, if it considers it just and equitable, increase the award to the higher amount of four weeks' pay.

Conclusions

15. Based on her length of service, age and weekly pay at the date of dismissal the Claimant is entitled to a basic award of £1954.05 (15 weeks x £130.27).

16. In relation to the compensatory award, there is no sum awarded for loss of earnings as this is covered by the award for wrongful dismissal. The Claimant sought an award for loss of statutory rights in the sum of £500. This figure considerably exceeds the Claimant's normal weekly pay. Taking into account the Claimant's normal weekly pay and balancing this against her considerable length of service with the First Respondent I award the sum of £300 for loss of statutory rights.

17. In relation to her claim for damages for breach of contract the Claimant is entitled to an award equivalent to the sums she would have earned during her 12 week notice period less sums earned in mitigation. The figure of £404.91 in the Claimant's Schedule of Loss was not challenged by the Respondents and is the sum I award.

18. The Claimant asked for an uplift to reflect the ACAS Code of Practice for a TUPE transfer. There is no applicable ACAS Code in relation to TUPE transfers (although ACAS does provide written TUPE guidance on its website). The Claimant's case was that she was dismissed without any procedure being followed and without being given a right of appeal and that her written grievance to the Second Respondent was ignored. The ACAS Code of Practice on Discipline and Grievances would be relevant to this if it is applicable to the Claimant's situation.

19. The Claimant was dismissed following her transfer without any of the steps set out in the ACAS Code on Discipline and Grievances being followed, including such basic procedural steps as a meeting between employee and employer and a right of appeal. This is clearly unreasonable and if the Code applied to the dismissal there would clearly have been a breach of it. However, the Code only applies to dismissals based on

conduct or capability. I don't consider that it can apply to the Second Respondent's decision to dismiss the Claimant, which was automatically unfair as it was because of the TUPE transfer but was not related to either the Claimant's conduct or her performance. Therefore, I find that the ACAS Code did not apply to the Claimant's dismissal.

20. However, the Claimant also argues that the Code was breached in relation to the written grievance she submitted to the Second Respondent on 17 January 2022 following her dismissal. As set out in the findings of fact this grievance was not responded to in any way, or even acknowledged.
21. I have considered whether the ACAS Code applies to grievances submitted after employment. In my view it would not be in accordance with the purpose of the Code to hold that it does not, as there are matters which could clearly be the subject of a grievance which may arise or still be outstanding on termination of employment and that it would be appropriate for employers to address using the procedure set out in the Code. I am fortified in this view by the fact that claims for a statutory redundancy payment under s.163 ERA 1996 are one of the jurisdictions listed in Schedule A2. I consider it likely that many grievances about statutory redundancy payments, which was one of the matters raised by the Claimant in her grievance, are likely to be made after termination of employment. As stated in my judgment on liability, I have found that the Claimant was an employee of the Second Respondent, albeit for a very brief period, as a result of the transfer of her employment from the First to the Second Respondent under TUPE on 20 December 2021.
22. Mr Lee for the Second Respondent decided not to put forward any evidence or make submissions in relation to the issue. I accept that Mr Lee may not have viewed the Claimant as ever having been employed by his company as she was dismissed a very short time after the transfer. However, regardless of this, the Claimant's grievance raised matters which should have been responded to by the Second Respondent in accordance with the provisions of the ACAS Code. It was unreasonable to simply ignore it. I therefore find that there was an unreasonable breach of the ACAS Code and in the circumstances I consider that it is just and equitable to award an uplift of 15%.
23. Finally, the Claimant sought an award of 4 weeks' pay under s.38 Employment Rights Act 2002 by reason of the failure to issue her with a statement of employment particulars.
24. The failure to issue the Claimant with a statement of particulars of employment during her employment was a failure on the part of the First Respondent, albeit one which the Second Respondent is now liable for by virtue of the TUPE Regulations. I note that there was no evidence about any complaint having been raised about this during the Claimant's employment and that her employment with the First Respondent appears to have continued for a lengthy period without any disputes arising until the sale of the First Respondent's business which has led to the current proceedings. In the circumstances I consider that the appropriate award is 2 weeks' pay, this being the sum of £260.54.
25. The Schedule of Loss included a claim for holiday pay but the Claimant

confirmed when she gave evidence that she is no longer claiming any sums in respect of holiday pay and in any event there is no complaint in relation to holiday pay before the Tribunal.

26. The total award is therefore £3025.24.

Employment Judge Gray-Jones
Date: 8th July 2023

SENT TO THE PARTIES ON
25th July 2023 by Miss J Hopes

FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless 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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