Case Number: **3300501/2021 and 3302588/2021**

EMPLOYMENT TRIBUNALS

Claimant: Ms S Warsame

Respondent: Four Seasons (No 7) Limited

Heard at: Watford Employment Tribunal (In person)

On: **6 July 2023**

Before: Employment Judge Quill; Ms S Boot; Mr P Miller

Appearances
For the claimant: In person
For the respondent: Mr D Piddington, counsel

Interpreter: Mr Nuri

REMEDY & DEPOSIT JUDGMENT

1. There is no basic award for unfair dismissal because the Claimant was employed for less than a year.

2. The Claimant has not acted reasonably to mitigate her losses. There is no Polkey reduction and no reduction for contributory fault.

3. The compensatory award for unfair dismissal is £4217.68. The Respondent is ordered to pay that sum to the Claimant.

4. The Recoupment Regulations do not apply.

5. In accordance with Rule 39(5)(b), the deposit of £200 which was paid by the Claimant shall be paid to the Respondent.

6. The Respondent has reserved its position as to whether to make a costs application, and, therefore, no decision has been made on any award based on Rules 39(5)(a) and 76.

REASONS

Hearing and Evidence

1. This was a remedy hearing which we had arranged at the hearing in March, immediately after we had given oral judgment and reasons. We also made some case management orders for this hearing. We were not asked for written liability reasons, either orally or at the hearing in March, or within 14 days of when the judgment was sent to the parties (which was 15 April 2023).

2. We heard evidence and submissions on 6 July 2023. This was fully in person. Almost all the communication with the Claimant was via the interpreter. There were some occasions when, of her own volition, she answered the question without waiting to hear the translation, and/or when she answered in English, or partly in English. The Claimant and the interpreter each confirmed to us that they could understand each other well.

3. In addition to the documents from the liability hearing, we had a 94 page remedy bundle (provided in hard copy, with some but not all of it provided electronically too). We also added 18 pages of documents at the Claimant's request, though some were duplicates.

4. The Claimant was the only witness. As well as the evidence in the written statement from the March hearing, she gave evidence in chief largely by responding to the judge's questions about her schedule of loss, but we also took account of the documents provided by her. She was cross-examined.

5. The Claimant had wanted to be able to cross-examine Mr Firtascu, and we took account of the fact that she, and the panel, had not had that opportunity.

6. We gave our remedy decision with oral reasons. The Claimant asked if she would be able to appeal. We told her that we would treat that as a request for written reasons, and that she could appeal in principle, but must make sure to comply with the time limits and procedural requirements for so doing.

7. After this, we heard submissions about the deposit, and then gave our decision on that issue with oral reasons. The Claimant asked if she could appeal against this decision, and we repeated what we had said earlier, including stating that we would treat that as a request for written reasons.

8. The Claimant asked if she could appeal against the liability decision, and, in particular, the fact that we dismissed her discrimination/harassment complaints. We informed her that we could not give her any legal advice about that issue. We reminded her that the decision and reasons had been made supplied orally in March, and that the written judgment had been sent to parties on 15 April 2023. We invited her to refer to the information in the covering letter with that judgment, and to research and/or take advice about the possibility of appealing against that judgment.

Law

9. The purpose of compensation is to provide proper compensation for the

wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

10. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

11. Section 123 of the Employment Rights Act 1996 ("ERA") provides tribunals with a broad discretion to award such amount as is considered just and equitable in all the circumstances, having regard to the loss sustained by the claimant because of the unfair dismissal. However, compensation for unfair dismissal under s.123(1) cannot include awards for non-economic loss such as injury to feelings (see the House of Lords decision in Dunnachie v Kingston upon Hull).

12. As part of the assessment, the tribunal might decide that it just and equitable to make a reduction following the guidance of the House of Lords in Polkey v AE Dayton Services [1987] IRLR 503. For example, the tribunal might decide that, if the unfair dismissal had not occurred, the employer could or would have dismissed fairly; if so, the tribunal might decide that it is just and equitable to take that into account when deciding what was the claimant's loss flowing from the unfair dismissal.

13. In making such an assessment the tribunal, there are a broad range of possible approaches to the exercise.
    a. In some cases, it might be just and equitable to restrict compensatory loss to a specific period of time, because the tribunal has concluded that that was the period of time after which, following a fair process, a fair dismissal (or some other fair termination) would have inevitably taken place.
    b. In other cases, the tribunal might decide to reduce compensation on a percentage basis, to reflect the percentage chance that there would have been a dismissal had a fair process been followed (and acknowledging that a fair process might have led to an outcome other than termination).
    c. If a tribunal thinks that it is just and equitable to do so, then it might combine both of these: eg award 100% loss for a certain period of time, followed by a percentage of the losses after the end of that period.

14. There is no one single "one size fits all" method of carrying out the task. The tribunal must act rationally and judicially, but its approach will always need to be tailored specifically to the circumstances of the case in front of it. When performing the exercise, the tribunal must also bear in mind that when asking itself questions of the type "what are the chances that the claimant have been dismissed if the process had been fair?", it is not asking itself "would a hypothetical reasonable employer have dismissed"? It must instead analyse what this particular respondent would have done (including what are the chances of this particular respondent deciding to dismiss) had the unfair dismissal not taken place, and had the respondent acted fairly and reasonably instead.

15. Tribunals apply the same rules concerning the duty to mitigate loss as apply to damages recoverable under the common law. Where the employee has mitigated, a tribunal should give credit for sums earned.

16. The relevant principles for addressing arguments that a claimant has failed to act reasonably to attempt to mitigate their losses were discussed very recently by EAT in Edwards v Tavistock And Portman NHS Foundation Trust Neutral Citation Number: [2023] EAT 33.

17. The general approach to mitigation is summarised by in Cooper Contracting Ltd. v Lindsay UKEAT/0184/15, at paragraph 16, which reads:

> (1) The burden of proof is on the wrongdoer; a Claimant does not have to prove that he has mitigated loss.
>
> (2) It is not some broad assessment on which the burden of proof is neutral. I was referred in written submission but not orally to the case of Tandem Bars Ltd v Pilloni UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in Pilloni itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.
>
> (3) What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable (see Waterlow, Wilding and Mutton).
>
> (4) There is a difference between acting reasonably and not acting unreasonably (see Wilding).
>
> (5) What is reasonable or unreasonable is a matter of fact.
>
> (6) It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.
>
> (7) The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer (see Waterlow, Fyfe and Potter LJ's observations in Wilding).
>
> (8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
>
> (9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient.

18. If there is a decision that there was an unreasonable failure to attempt to mitigate, then, when assessing the amount of reduction for the employee's failure to mitigate, the tribunal does not reduce the compensatory award that it would otherwise make by a percentage factor. The correct approach is to make a decision about the date on which the Claimant would have found

work had they been acting reasonably to seek to mitigate their losses, and then make an assessment of what income they would have had from such work.

19. So the approach is:

    a. Decide what the claimant did, and did not, do to attempt to mitigate their losses.

    b. Consider what steps it would have been reasonable for the claimant to have had to take to mitigate their loss, and where the claimant has not taken some or all such steps, decide why that was.

    c. Ask if the claimant acted unreasonably by any failure to take particular steps to mitigate their loss taking into account the Claimant's explanation (where that explanation has been believed).

    d. Decide to what extent would the claimant have mitigated their loss had they taken those steps

20. It is for the Respondent to prove that the Claimant has unreasonably failed to take appropriate steps, and that – on balance of probabilities - had those steps been taken, then the losses would have been mitigated.

21. It is not enough for the Respondent to show that there was some other step that might hypothetically have been taken. It has to show that the failure was unreasonable. Furthermore, if taking the additional steps would have been unlikely to have resulted in finding a new job more quickly, or increased earnings from such a new job, then the award of compensation will not be reduced, even if the failure to take the steps was unreasonable.

Facts

22. As per our liability decision, the Claimant was unfairly dismissed (contrary to section 103A of the Employment Rights Act 1996). The Claimant's employment in the care home started in late November 2020 and ended on 9 December 2020 when she was dismissed with immediate effect. She received a payment in lieu of notice for 1 week. So, in effect, she was paid as if she had worked until 16 December 2020.

23. Taking into account the contents of the application form in the hearing bundle (and the Claimant accepts the contents are accurate, albeit telling us that it is not in her handwriting), the Claimant had previous experience of working as a care worker, and as a nurse assistant. She also had a diploma in nursing which she had obtained abroad.

24. As we said in the liability decision, the Respondent was already aware of the fact that her experience was limited at the time it chose to employ her. It was also aware that her spoken English was such that she had required an interpreter for the job interview. Again, that had been no barrier to employing her.

25. The Respondent had an urgent need for staff. Our finding is that she would not have been dismissed around December 2020 if it were not for the protected disclosure.

26. It is more difficult to say whether she would successfully have passed probation because the evidence is so limited. In the liability decision, we commented on the alleged complaints that her colleagues had – on the Respondent's case – made about the Claimant and her performance. We were not satisfied that the evidence was reliable.

27. The Claimant has claimed that she made significant efforts to find work. However, based on the complete absence of any documentary evidence, we are not satisfied that she did.

28. The Claimant was shown in the bundle a list of agencies which the Respondent said were close to her home [Liability Bundle 181]. The Claimant said that she might have applied to one of them, but could not be sure.

29. The Claimant was shown in the bundle a list of care worker vacancies from around February 2023 which the Respondent said were close to her home [Liability Bundle 149-156] and a bit further away [157-180]. The Claimant said – at the liability hearing and again as the remedy hearing - that she had applied for some of these jobs. We are not satisfied that she did; she has provided no documents to support the claim, and no clear account of what responses she got.

30. The Claimant has claimed that, in the period after leaving the Respondent, more than once, she made a phone call, was told that there was work available, then presented herself in person to ask for an application form, and was told that she could not have one, and there was no work available. She says that, each time, the information that there was work available was given before she stated her name, and the (alleged) change of position was after she stated her name/details. She invites us to infer that the Respondent must have told these prospective employers not to employ her, and/or that she was a trouble-maker, or similar.

31. It is implausible that this exact same sequence of events would have played out several times, and we find that it did not. If the Claimant was applying for jobs, and/or requesting application forms which she could complete and submit, it would not all be done by a phone call, followed by an in person visit. There would have been some opportunity for her to apply by email, or completing on-line form, or registering interest electronically. It is implausible that there would not be even one written reply back to her (on her case) telling her that there was no work and/or that her application was unsuccessful.

32. The Claimant accepts that she has no positive evidence that the Respondent, or Mr Firtascu, told any agencies or prospective employers not to use the Claimant, or that she was a trouble-maker, or similar. She simply invites us to infer that they did, as being the most likely explanation for why someone with her experience and qualifications was repeatedly refused work. However, our finding is that she was not repeatedly refused work. We have seen no evidence of any applications at all. Furthermore, even if the Claimant's description of events as per paragraph 28 above is based on something that did really happen at least once, that would be insufficient to show that the reason was that the Respondent had done anything. On her own account, she did not even get as far as telling the unidentified prospective employer or agency that she had worked for the Respondent,

and so they could not have got as far as contacting the Respondent for any information. The Claimant's case would have to be that the Respondent had done something which caused her name to appear on some sort of blacklist, where it would be seen without the Respondent even being contacted when she did apply for jobs. There is no evidence of that, and we find that it did not happen.

33. The Claimant's position is that she has disclosed all the payslips that she has received, and disclosed bank statements from her only bank account. She admits doing one day's agency work in 2021, but says the agency refused to pay her, and so she has no payslip. A shop where she did some work has since closed down, and so she has not been able to provide any proof of what income she had from that. She has declared £800 for one spell of working for a charity, and self-employed income of £1470.

34. In relation to agency work, Mr Firtascu's witness statement for the liability hearing included the following, and he answered questions on oath about these alleged events at the liability hearing (notably because the Claimant admits one of the interactions, but says it was very different, and Mr Firtascu sought to bully her to retract the allegations she had made while working for the Respondent).

> I understand that Mrs Warsame has not declared that she has done any work since leaving the Company. However, I have come across Mrs Warsame a couple of times working at other care homes. I was working as a Manager at one home when Mrs Warsame came as agency. When Mrs Warsame saw me she left and did not complete her shift. I then saw Mrs Warsame another time, when I was working as agency as a nurse in a care home. Mrs Warsame was arguing with the staff and the deputy manager sent her home.

35. Even if the Claimant is correct that she encountered Mr Firtascu one time, not two, then it is still a remarkable coincidence that, on her case, she had made strenuous efforts to find employment, and the one time one agency agreed to offer her a shift, Mr Firtascu was there. She has no documentation to show applying to this agency, being accepted by them, or relating to any dispute with them about why they would not pay her. Taking her at her word, then the one piece of care work that she did since leaving the Respondent was one day some time in around mid-2021 or later, and there was nothing before or since.

36. We take account of the fact that in early January 2021, mid-January 2021 and early February 2021, the Claimant had (at least) three positive Covid tests, and that she was obliged to self-isolate from early January to around mid-February 2021. She would not have been able to do work in any care setting during this period, regardless of whether she was offered it or not.

37. However, during this period, she would still have been able to apply for jobs and register with agencies. The agencies and prospective employers would still have been able to carry out vetting and other pre-employment checks.

38. The Claimant's contact provided for her to work 44 hours per week, and be paid £9.01 per hour. So that is £396.44 gross per week. The employer's pension contribution was 3% of gross salary.

39. The contract did not provide for reimbursement of expenses, whether associated with right to work, or otherwise.

40. Based on the calculations shown by the Respondent [Remedy Bundle 94], our finding is that the net weekly pay, averaged over a full year, would have been £339.58 per week.

Analysis and Conclusions for Remedy

41. The Claimant has argued that we should award compensation for a period during her employment in which – she argues – she was not given work and/or was not paid. We discussed the lack of clear information about which shifts the Claimant worked in the liability reasons. However, these alleged losses would not be losses flowing from the unfair dismissal.

42. She also asks us to award sums for £1,560 for Immigration Health Surcharge. NHS; Renewal of my indefinite leave applications fees £1,052.20; biometric fingerprint costs (around £200 per time). She has not provided specific proof of the sums in question. However, none of these things are losses flowing from the unfair dismissal. They are expenses she would have incurred in any event, and the Respondent would not have reimbursed them even had she remained in employment.

43. Similarly, the Claimant would have had to pay her council tax and fuel bills regardless of whether she was dismissed by the Respondent or not.

44. Any sums which she has paid for legal advice are not losses flowing from the unfair dismissal. She has not supplied invoices, and the schedule of loss referred to immigration advice (whereas the oral evidence referred to having sought advice about the dispute with the Respondent).

45. Our decision is that the Respondent has persuaded us that the Claimant has unreasonably failed to attempt to mitigate her losses. There are no application forms or other documentary proof of job applications, or expressions of interest, or registration with agencies, or rejections. Our finding is that the Claimant was not actively looking for work after her dismissal (or, at most, was making minimal attempts to find work).

46. Had the Claimant started looking for work in late December 2020, or early January 2021, then our decision is that she would have been able to start work, for a similar weekly salary and pension, from no later than around mid-March 2021. That is, she would have been able to find work, and all the pre-employment checks would have been completed, in time for her to start by then. She would have no longer been self-isolating, or barred from care settings, because of the 3 February (and earlier) positive Covid tests.

47. The reason we say that she would have been able to find work in the period is because of the high demand for workers in that industry at that time. There were far more vacancies than there were workers to fill them. There was work available (including via agencies) on a short term basis, providing cover for people unable to work (due to Covid tests, or other covid-related reasons), and also on a longer term/indefinite basis.

48. The Respondent has provided evidence of this both for early 2021, and later 2021, from reliable sources of information including UK government announcements.

49. The Respondent has also provided job vacancy lists which are not from 2021, but are from 2023. However, we accept that there was a similar high number of vacancies, including in locations near to the Claimant's home, in 2021.

50. Given the absence of evidence, it seems possible that the Claimant did not apply for any jobs at all. In any event, we are satisfied that she could only have applied, at most, for a very small number, and that had she made a reasonable number of applications, she would have received several offers of employment.

51. We will award losses for a period of 12 weeks from the end of the period to which the payment in lieu of notice related.

52. We do not make any reduction to reflect the chance of the Claimant being dismissed by the Respondent within that period. The Respondent had a desperate need for staff at that time, as did other employers in the sector. We are satisfied that even if (as the Respondent claims) there were any concerns over her performance in the first few weeks, then the Respondent would have persevered and waited to see if there was improvement, and attempted to bring about improvement. We think that the Respondent would have probably waited until close to the end of the probation period before it decided whether to confirm her in employment, or else terminate her. Taking into account that the Respondent has not satisfied that the alleged concerns over her performance were unrelated to the whistleblowing, we think the chances of her being dismissed by the Respondent prior to mid-March 2021 were negligible.

53. There is no basic award because her period of employment was not long enough. We do not award anything for loss of statutory rights for a similar reason. There is no injury to feelings award, because the only successful claim was unfair dismissal.

54. Twelve weeks net salary would have been: 12 x £339.58 = £4074.96.

55. Twelve weeks worth of employer pension contributions would have been: 0.03 x 12 x £396.44 = £142.72.

56. The aggregate is £4,217.68

57. The Claimant has not convinced us that any of the weeks should be assessed at £500 per week based on what she says she would have been paid as a track and trace payment. She has not proven the rules of the scheme (for her area, or any area) to us, or convinced us that it would be logical for her to be entitled to a payment higher than her normal week's pay. She also has not proven that she applied, and was told that she would have been eligible had she been working, and that the only reason she was not eligible was that she was not working. Our above-mentioned calculation compensates her for the weeks in question on the basis of what she would have earned had she been working for the Respondent, and either been paid while she was self-

isolating, or paid, if she had not caught Covid in the hypothetical circumstances of not having been dismissed in December 2020.

Analysis and Conclusions for Deposit

58. A decision was sent to parties on 4 October 2021. It was a deposit order which had been announced orally at a hearing before EJ KJ Palmer on 20 September 2021.

59. The deposit order was for £200 and the Claimant paid it. That sum is currently held by tribunal service. The Respondent made an application under Rule 39(5), which reads:

> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
> (a) ..
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
> otherwise the deposit shall be refunded

60. In this case, the deposit order was made because of the arguments supporting the discrimination claims. The judge had refused to make a deposit order for the whistleblowing claim.

61. The reasons for the deposit order were:

> The claimant has not advanced any claim other than ticking the box on the ET1. She has not identified the religion or belief upon which she relies nor has she set out in any way the nature of the discrimination she relies upon. The best she did was some vague suggestion of colleagues making comments under their breaths. On the face of what is before me it appears that the claimant may be in some considerable difficulty in pursuing her discrimination claim, however I am mindful of the authorities and the general principals on strike out where a claimant is unrepresented and the claim is in discrimination. Therefore I do not propose to strike out the discrimination claim as having no reasonable prospect of success, I do consider however that the lower standard under rule 39 has been reached and that there is little reasonable prospect of success. I therefore propose to make a Deposit Order that the claimant should pay into the Tribunal the sum of £200 on or before 15 October 2021 to enable her claim to proceed. If that payment is not made by that date then the claimant's claim in discrimination on the grounds of religion or belief is struck out. If the payment is made in time then the claim can proceed. I have taken into account the claimant's means that I questioned her on and considered £200 to be an appropriate sum. Accordingly this matter will be further considered in a closed preliminary telephone hearing to take place on 6 December 2021, the purpose of that hearing will be a case management discussion to isolate claims that remain and to make appropriate orders for those claims going forward.

62. By the time of the liability hearing in March 2023, matters had progressed, and there had been some clarification. The specific acts alleged to be harassment or else direct discrimination were set out in the list of issues as follows:

> 3.2 Did a male nurse working on the ground floor of the respondent's care home on a Sunday (the actual date was unable to be confirmed by the claimant) do the following things:

3.2.1 tell the claimant that she should not be doing the job because she was wearing a hijab;
3.2.2 tell the claimant that "your kind of people should not be working here";
3.2.3 tell the claimant, "we are having a meeting so you will not work here anymore"; and
3.2.4 tell the claimant, [AK] is not working here anymore and you are still working here. That's not fair".

63. However, there was still some vagueness about who said what, and when. As we said in the liability reasons, we thought it was entirely normal, and not suspicious, if the Claimant did not know all her new colleagues' names or job titles, and if she did not know which colour uniform signified (say) nurse or other staff.

64. However, because of what the Respondent believed that the Claimant was alleging, it produced a witness from a male nurse, SS, which explained why he assumed that the allegation could only relate to him, and why, also, it was not possible for him to have made the alleged comments to the Claimant on a Sunday during her employment. At the hearing, the Claimant accepted that SS was probably not the person that she had been seeking to describe in paragraph 3.2 of the list of issues. There was a lack of clarity, however, about whether the allegation related to:

    a. An employee, NF, whom she had shadowed on one of her first shifts. (She suggested that possibly this person actually was a nurse, and the Respondent was lying by saying he was not.)

    b. An employee, MN, who had been present at the Claimant's End of Probation Meeting (that is the dismissal meeting). The Claimant's suggestion that this might have been the right person only seemed to be made after the panel had pointed out to the Respondent that this person was listed as a nurse and asked why, therefore, had the Respondent only asked SS to produce a statement, and not MN. [Having taken instructions, the Respondent's counsel told us that the Respondent's position was that MN is female, and hence they had not seen the need for a statement from her.]

65. A large part of the reason that the Claimant's Equality Act arguments failed on the facts was the vagueness of the allegations. Our view was that she could easily have been specific had her allegations related to NF. She had not just met him once, and it is likely that she knew his name; even if she did not, she could have identified as the person whom she had shadowed on particular shifts. Similarly, she could easily have been specific had her allegations related to MN. She might not have known MN by name, or have worked with MN, but it would have been easy to have said (much sooner than the final hearing) that the person she was accusing had been present at the dismissal meeting. She failed to persuade us on the balance of probabilities that these comments had been made, and a significant factor was the vagueness of the allegations.

66. We therefore believe that the reason that the Claimant lost on the argument or allegation that there had been discrimination or harassment was substantially the same as the reasons identified by EJ Palmer as the reasons for making the deposit order.

67. Our decision is therefore that the deposit of £200 will be sent by tribunal service to the Respondent, and will not be returned to the Claimant. (For avoidance of doubt, the Claimant does not have to pay a new sum of £200).

68. The Respondent has reserved its position on whether it will apply for costs. Therefore, we make no decision one way or the other on that.

69. The Respondent has been ordered to supply payment details within 7 days.

Employment Judge Quill

Date: 10 July 2023

Judgment and Reasons sent to
the parties on

.....23 August 2023.....

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For the Tribunal office