EMPLOYMENT TRIBUNALS

Claimant: Miss G Holland

Respondent: Zion Care (St Albans) Limited

Heard at: Liverpool **On:** 31 March 2023

Before: Employment Judge Benson

REPRESENTATION:

Claimant: In person
Respondent: Mr J Middleton, Solicitor

JUDGMENT having been sent to the parties on 5 April 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS ON REMEDY

Issues

1. The claimant's claim of unfair dismissal and wrongful dismissal were upheld by a judgment dated 31 March 2023 and this hearing was listed to consider remedy. The claimant was seeking compensation and provide an updated schedule of loss.

Evidence and Submissions

2. . Ms Holland gave evidence on her own account and was cross examined. Ms L Kewley gave evidence on behalf of the respondent. We were able to reach agreement upon some of the figures relating to the claimant's pay as set out below, and in the schedule attached to the judgment. The respondent and claimant provided helpful written and oral submissions providing their respective views on the compensation which I should award. A large bank of authorities was provided by the respondent and some were referred to by Mr Middleton and by the claimant and I have had regard to them where relevant.

The Law

Unfair Dismissal Remedy

3. The statutory provisions relating to remedy are set out in Chapter II of part X of the Employment Rights Act 1996. Principles for the calculation of the basic award and damages for breach of contract were agreed. The following principles in relation to the compensatory award were relevant in this case.

Polkey

4. The first arises out of the nature of a compensatory award for unfair dismissal under section 123(1) of the Employment Rights Act 1996:

"(1) Subject to the provisions of this section and sections 124 and 126, 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 in so far as that loss is attributable to action taken by the employer."

5. It has been established since Polkey v A E Dayton Services Limited [1988] ICR 142 that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that exercise. The Court of Appeal in O'Donoghue v Redcar and Cleveland Borough Council 2001 IRLR 615 in rejecting the employee's appeal, stated that: 'If the facts are such that an [employment] tribunal, while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis. We do not read Polkey Kind v Eaton Ltd as precluding such an analysis.'

Contributory Fault

6. The second is a reduction by way of contributory fault. It can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 of the Employment Rights Act 1996 respectively:

"Section 122 (2): 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….

Section 123 (6): 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."

7. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in Nelson v BBC (No 2) [1980] ICR 110 to the effect that the statutory wording means that some reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."

ACAS Code

8. The third remedy issue related to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015. An unreasonable failure to follow the Code by an employer can result in an increase of up to 25% in the compensatory award: section 207A Trade Union and Labour Relations (Consolidation) Act 1992. An unreasonable failure by a claimant can result in a reduction in compensation also limited to 25%.

9. Finally, I have had regard to the principles concerning the dismissal causing or contributing to the claimant's ill health, including the EAT decision in Devine v Designer Flowers Wholesale Florist Sundries Ltd 1993 IRLR 517, EAT, where the EAT reminded itself that an employee can only recover losses that are attributable to action taken by the employer. In that case, the employee's dismissal caused her to suffer anxiety and depression, which rendered her unfit for work. The EAT stated that the fact that the employee's incapacity was caused by the unfair dismissal did not necessarily mean that she was entitled to compensation for the whole period of incapacity. It was for the tribunal to decide how far an employee's losses are attributable to action taken by the employer and to arrive at a sum that is just and equitable.

Findings of Fact and Decision

Wrongful Dismissal

10. It was agreed that the claimant was entitled to notice of four weeks. There was a very slight difference between the weekly net pay put forward by each party and I have taken the figure between the two as the claimant's weekly net pay. That figure is £381 per week. The claimant is therefore awarded damages of four weeks net pay amounting to £1,524.

Unfair Dismissal

Basic Award

11. The basic award was agreed at £704.41, that being a gross weekly pay of £469.61 by a multiplier of 1.5, the claimant being aged 50 at the date of termination and having one year's continuous service.

Compensatory Award

12. The basis of a compensatory award is set out in section 123(1) of the Employment Rights Act 1996, which provides that 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 in so far as that loss is attributable to action taken by the employer."

13. The claimant suffered a loss of income from the date of her dismissal. She accepts that she did not seek any work from the date her employment ended until very recently, when she is working towards new employment with a number of support agencies. She says that was because she was not well enough to work as her dismissal had and still has a damaging physical, emotional and mental impact upon her, causing depression and a sense of feeling lost, vulnerable and isolated. The respondent disputes that link and submits that that the claimant should have been seeking new work and that there were roles both within and outside social care that the claimant could and should have applied for.

14. Between her dismissal on 15 May 2020 and 11 November 2020 the claimant did not seek any medical advice relating to her mental health. This was during the initial stages of the Covid pandemic. On 12 November 2020 she attended an appointment with her GP and was diagnosed with anxiety and depression, and she has told the Tribunal that medication was prescribed. The claimant has provided no further medical evidence about her conditions or about the progress or management of her mental health until a further fit note from her GP dated September 2021. There is no evidence as to any further attempts to see her GP or to review her medication before that date.

15. I have heard clear and compelling evidence from the claimant as to the impact that the dismissal has had upon her mental health. I accept her evidence that she had never suffered with any mental health issues in the form of anxiety or depression prior to these events, and although medical evidence would normally be produced in these circumstances, I accept that for the period from her dismissal through to February 2021, the claimant was unable to work because of her ill health and that her depression and anxiety were caused by her dismissal or at the very least her dismissal was a significant contributing factor. In coming to this conclusion, I note that the claimant had been in work up to the date she was suspended, she had not suffered with mental health issues previously and that the correspondence indicates that she was keen to engage in the disciplinary process and answer any concerns the respondent had so that she could return to work. I find that had the claimant not been dismissed, she would have been able to continue in work.

16. The claimant asks me to find that this remained the position and seeks an award for her losses through to the date of the remedy hearing. In the absence of medical evidence, I do not however consider that I can safely conclude that the claimant's ongoing ill health after February 2021 was caused by her dismissal. To do so would be speculation.

17. An employee is under a duty to take reasonable steps to mitigate her losses and I find that in being unable to work by reason of her ill health, there was no failure to mitigate her losses during the period to the end of February 2021.

18. The duty to take reasonable steps to mitigate is an ongoing duty. The burden is on the respondent to show a failure to mitigate losses. The claimant accepts that she did not seek new work, and she submits that was because she was not well enough, however she did not have any ongoing engagement with her GP. This was not a reasonable approach. Having made the initial contact with her GP about her anxiety and depression and having been put on medication, it would have been reasonable for her to have continued to engage with the GP thereafter. I consider that had she done so, it is likely that her condition would have improved and that it is likely that by February 2021, the claimant would have been in a position to start to look for some work. Had she done so I conclude that the claimant would have been successful by May 2021.

19. It is clear to me that the claimant is a very intelligent woman and indeed to have conducted these proceedings in the way she has, if she did not wish to continue to work in the care sector as she says, I accept the respondent's contention that she would have been able to find work in a different sector which would have paid a similar salary as she was earning when she was with the respondent. The respondent has produced evidence of the types of vacant roles which the claimant might have applied for at a similar salary. They include administrative roles.

20. I therefore find that had the claimant taken reasonable steps to mitigate her losses, she would have found alternative work at a similar salary from May 2021. I have assessed the date as 15 May 2021 which was 12 months after the claimant's dismissal.

21. On that basis her losses are 52 weeks' net salary of £381 providing a total of £19,812. In addition, the claimant's losses include employer pension contributions of £10.96 a week, for 52 weeks amounting to £569.92.

22. I move on to consider the factors raised by Mr Middleton on behalf of the respondent. These relate to the deductions that he contends should be made to the compensatory award.

Polkey

23. The first of those I am going to deal with is any deduction by reason of the principles set out in Polkey**.** The respondent says that I found that the claimant believed that the respondent had grounds to dismiss her for gross misconduct and that the BB video was inappropriate and should not have been posted. As such that both parties were aware that dismissal was inevitable regardless of any substantive or procedural unfairness. I do not believe that the concession suggested to have been made by the claimant was a conclusion I reached in my findings. Indeed, the claimant disagreed with the respondent's view of her behaviour. Although the respondent had the view that the claimant's conduct amounted to gross misconduct, that is not sufficient for me to reduce any award as I have to consider whether, if the claimant hadn't been automatically unfairly dismissed, it would have dismissed the claimant for the alternative reasons and whether that dismissal would have been fair.

24. Within the Judgment on liability, I made it clear the different ways in which the respondent dealt with the claimant's allegations of abusive behaviour towards residents, and those on the Facebook pages in which the respondent says she abused residents. Further, I find that in those particular times, being in the midst of the Covid pandemic, it is unlikely that the respondent would have dismissed the claimant in these circumstances for those issues. There was a shortage of carers at the time and care homes were under considerable staffing pressures. I also find that the respondent would not have gone looking for issues it could use to dismiss the claimant or to have followed them up in the way that they did. I further note and have taken into account in coming to my decision that the respondent does not appear to have sanctioned or dismissed anyone else in respect of the events for which the claimant was purportedly dismissed.

25. The claimant in her submissions has set out reasons as to why she did not believe that the respondent would have fairly dismissed, and I agree with her submissions.

26. I make no deduction under the Polkey principles.

Contributory Fault

27. Moving on to contributory fault, I do not feel that it is appropriate in these circumstances to make any deduction for contributory fault. The claimant did not in any way contribute to her dismissal which, as I have found, was on the grounds of her making a public interest disclosure.

ACAS deduction

28. I do not accept that the claimant has acted unreasonably in not using the respondent's whistleblowing policy. She raised issues with her managers and regional managers which she believed would be dealt with. Although she may not have made reference to the policy itself, she made disclosures in the interests of residents and in the spirit of the policy.

29. In summary, two other points in relation to the compensatory award arise:

Loss of statutory rights

30. I award the figure of £500 in respect of statutory rights.

ACAS Uplift

31. The dismissal process was carried out an unexplainable speed without giving the claimant any opportunity to understand the allegations against her and not allowing her time to take any advice. I find that those particular features are in breach of the ACAS Code, particularly the transparency and fairness of any process that should be undertaken, and also that a necessary investigation should be carried out. I find that other parts of the process were followed, for instance the fact that the claimant was given an appeal and issues were able to be discussed at that stage. I therefore find that the appropriate uplift is 10%.

Total Compensatory Award

32. In conclusion, I find that there are immediate losses of 52 weeks net salary and pension contributions that total £20,381.92. The recoupment provisions will apply and so some of that amount will be recouped by the relevant department in respect of benefits that have been received.

33. In addition, I make an award of loss of statutory rights of £500 and an ACAS uplift that amounts to £2,088.19. The total compensatory award is £22,970.11.

Further awards sought by the claimant

34. I wish to address other heads of damages which the claimant was seeking.

(1) Injury to feelings – This was a claim of unfair dismissal, even though it was automatic unfair dismissal relating to public interest disclosure. As such there is no provision to make an award in respect of injury to feelings.

(2) Aggravated damages – Aggravated damages are part or sit alongside an injury to feelings award in discrimination cases and it is not appropriate in those circumstances for me to make any award under this head.

(3) Interest – Interest in unfair dismissal claims runs if the award is not paid in accordance with the judgment. It is not payable in relation to compensation awarded.

35. There are no awards in respect of any of these heads of claim.

Employment Judge Benson
Date: 1 September 2023

REASONS SENT TO THE PARTIES ON
4 September 2023

FOR THE TRIBUNAL OFFICE