



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105122/2022

Held at Aberdeen on 17 July 2023

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Employment Judge N M Hosie

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Mrs T Bello

**Claimant
In Person**

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Deeside Care LLP

**Respondent
Represented by
Ms A Stobart,
Counsel
Instructed by,
Mr Z Mo,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the respondent shall pay to the claimant the sum of Ten Thousand, Four Hundred and Eleven Pounds and Forty-two Pence (£10,411.42), as compensation for her unfair dismissal.

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E.T. Z4 (WR)

REASONS

1. On 13 June 2023, I issued a Judgment in the following terms:-

5 *“The Judgment of the Tribunal is that: -*

1. the claimant was unfairly dismissed by the respondent; and

2. a Remedy Hearing should be fixed.”

10 **Remedy Hearing**

1. The case called before me again on 17 July 2023, therefore, by way of a Remedy Hearing. The claimant represented herself. The respondent was represented by Counsel, Ms A Stobart.

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The evidence

2. I heard evidence from the claimant at the Hearing. She gave her evidence in a measured, consistent and convincing manner and presented as credible and reliable.

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3. A Joint Bundle of documentary productions was also lodged (“P”).

4. I heard submissions from the respondent’s Counsel.

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Basic Award

5. I did not find favour with the submission by the respondent’s Counsel that the claimant had contributed to her unfair dismissal by her own conduct and that a deduction in the Basic Award should be made to reflect this. In the reasons for my Judgment, I made no finding in fact that the claimant was guilty of any misconduct. There was, therefore, no contributory fault on her part.

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6. It was agreed that, absent any such deduction, the Basic Award would be **£7,805.25** (P.7).

Compensatory Award

5 Mitigation of loss

7. The claimant was still unemployed at the date of the Hearing and in receipt of benefits. Counsel submitted that there should be no Compensatory Award as the claimant had failed to mitigate her loss, mainly because, despite the terms of my Order (P.3), there were only a few supporting documents in the bundle, in respect of her job applications (P.13-19), along with an e-mail from Asda dated 12 July 2023 rejecting a job application (P.51).

8. However, I accepted the evidence of the claimant, who presented as entirely credible and reliable, that following her summary dismissal for gross misconduct and her detention for a short time by the Police, she was, “*very upset, worried, confused and depressed*”; that she had consulted her doctor and she was prescribed medication. Consequently, she only started to look for alternative employment in July; she had been doing so actively since then, mainly by way of online applications, but thus far she has been unsuccessful. That was perhaps not surprising as she is now 50 years of age; she has no formal qualifications; she had worked for the respondent for over 11 years; she cannot apply for work in the care sector as the SSSC has imposed a “Temporary Suspension Order” on her for a period of 12 months from 25 July 2022 (P.39-45); and the fact she was dismissed for gross misconduct will be an impediment to her securing alternative employment. In all these circumstances, I am satisfied that she has taken reasonable steps to mitigate her loss.

9. In any event, the onus was on the respondent to prove that the claimant had failed to mitigate, and they failed to discharge that onus. No evidence was led, for example, of suitable jobs being available and that the claimant should have engaged in a search for them.

Compensatory Award

10. The Compensatory Award is intended to reflect the actual financial losses that the employee suffers, as a consequence of being unfairly dismissed. In terms of s.123(1) of the Employment Rights Act 1996, Employment Tribunals are directed to award *“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.”*

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SSSC Temporary Suspension Order (“TSO”)

11. The respondent was legally obliged to report the allegations by resident “R” of her treatment at the Care Home to the SSSC (P.24-28). On or about 21 April 2022, they reported her allegations, initially to the Care Inspectorate and the Local Authority (P. 29-37). On 28 June, the SSSC advised the respondent that they would be seeking a TSO against the claimant (P.38). Following a Hearing, the SSSC decided to impose a TSO with effect from 25 July 2022 for a period of 12 months (P.38-45). Had that Order not been imposed, I am satisfied that the claimant would probably have been able to find suitable alternative employment in the care sector, notwithstanding her summary dismissal on 27 May from her employment with the respondent. I heard evidence that jobs were available and her colleague, Ms Wolowolo, who was summarily dismissed at the same time as the claimant, had been able to find alternative employment in the care sector. However, the SSSC had not imposed a TSO on her.

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12. In these circumstances, I find favour with the submission by the respondent’s Counsel : I am unable to find that the loss sustained by the claimant after 25 July 2022 was *“attributable to action taken by the employer”* which is a fundamental requirement of the relevant section in the 1996 Act. The chain of causation between her unfair dismissal and the financial loss flowing from

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that dismissal was broken by the SSSC's decision to impose a TCO. The Tribunal's discretion to make an award of compensation for financial loss can only be exercised in the context of loss attributable to the employer's conduct and resulting from the dismissal. As I recorded above, the respondent was
5 under a duty to report R's complaint to the SSSC and its decision to impose a TSO and thereby prevent the claimant securing work in the care sector, was, as respondent's Counsel put it, "out of their hands". It was a matter over which the respondent had no control and for which they could not be held responsible. The claimant's financial loss after 25 July was not as a
10 consequence of the wrong, namely the unfair dismissal, but rather as a consequence of the legal requirement which the respondent had to report R's allegations to the SSSC.

13. I was driven to the view, therefore, that it would only be "just and equitable"
15 to award the claimant compensation for the 9½ week period from the date of her dismissal on 27 May 2022 until 25 July 2022 when the TSO took effect. She had no income, in any form, during that period and had to rely on the generosity of family and friends. It was agreed that when she was employed by the respondent the claimant's average net weekly wage was £404.59. Her
20 loss, therefore, for that 9½ week period was **£3,843.61** (9.5 x £404.59).

14. I am bound to say, that I arrived at this view with considerable reluctance given the apparent injustice to the claimant. She is still unemployed and in receipt of benefits and the award goes nowhere near reflecting her actual
25 financial loss since her unfair dismissal. While I appreciate that R's allegations were serious, and the SSSC only had to be satisfied that there was a *prima facie* case, a balance had to be struck as surely consideration also had to be given to the effect on the claimant were a TSO to be issued. There was clearly a direct conflict in the evidence between R's account and
30 that of the claimant and her colleague Ms Wolowolo, but the SSSC did not hear evidence at the hearing; issues of the credibility and reliability of evidence were not considered; and, in my view, the submissions by the claimant's solicitor at the Hearing were well-founded (P.42). By the time of

the SSSC Hearing, the claimant had been dismissed for gross misconduct. She was unemployed and were a TSO to be put in place it must have been clear that the effect on her would be very significant indeed, particularly as the sole provider for two children. With a TSO in place, she would be unable to work in the care sector and she was likely to be facing a lengthy period of unemployment. In all these circumstances, it seems to me that it was very important indeed to hear evidence, to address the issues of credibility and reliability, establish the facts and resolve the conflicting evidence, as a matter of some urgency. But that was not done despite the fact there was no impediment to doing so as the police had advised that, having investigated the matter, there was no evidential basis for charging the claimant. Instead, a TSO was put in place for the very significant period of 12 months, based solely on a *prima facie* case. I also understand that the TSO will remain in place until a 6-day Hearing in late August. This means that although she was unfairly dismissed, the claimant is prevented from working in the care sector due to the TSO, after working for the respondent for over 11 years and having an unblemished record and is likely to be unemployed for over 12 months with a significant loss of income which she will not fully recover. While I appreciate that R was a vulnerable elderly lady who had made serious allegations and the SSSC had a difficult decision to make faced with a direct conflict in the evidence, and while not directly relevant to the issues with which I was concerned and the SSSC was not a party in the case, I think it is at least worthy of comment that, in my view, the imposition of the TSO, for such a lengthy period as 12 months, was disproportionate and unnecessary.

Loss of statutory rights

15. The claimant is also entitled to an award in respect of so-called "loss of statutory rights" which I assess at **£500**.

16. Accordingly, the claimant's total loss is **£4,343.61**.

“Polkey reduction”?

17. In *Polkey v. AE Dayton Services Ltd* [1987] IRLR 503, the House of Lords established that in determining the fairness or unfairness of a dismissal, it is not open to an Industrial Tribunal (as it then was) to consider whether, if the employer had acted fairly by following the proper procedures, the employee might have been fairly dismissed. The reasonableness of a decision to dismiss must be tested by what the employer actually did and not what it might have done. However, Lord Bridge said that when an Industrial Tribunal comes to calculate compensation for an unfair dismissal, it can consider the probability that even if the employer had taken those steps which it failed to take before dismissing, the fair procedure would not have affected the outcome – that is, the decision to dismiss. Where the Tribunal concludes that proper procedures would have made no difference, the employee, though unfairly dismissed, will recover no Compensatory Award. But there is no need for an “all or nothing” decision in this context. Compensation may properly be reduced by a percentage to reflect the Tribunal’s assessment of the likelihood that the employee would still have been dismissed, even if proper procedures had been followed.
18. Counsel submitted that if a fair procedure had been followed then the outcome would have been the same – the claimant would still have been dismissed and that accordingly there should be no Compensatory Award. In support of her submission, she referred me to the evidence of R’s daughter and son, the fact that the Manager at the Home, had carried out an investigation and spoken to R and the fact that she had identified the claimant as she was, “*the one with the headscarf*”. She submitted that it was “likely” that R would have given the same account when faced with the denials by the claimant and her colleague Ms Wolowolo. She submitted that it was significant that the claimant denied any distress on the part of R or that anything untoward had happened in the evening in question, which was clearly not the case.

19. However, even if the respondent had gone back to R to advise her of the claimant's conflicting account and that of Ms Wolowolo, and even if R had given the same account, the respondent would still have been faced with a direct conflict in the evidence. While I appreciate that the respondent only had to have a "reasonable belief" in the claimant's guilt, their decision would require to have been made in the context of an employee who had 11 years' unblemished service; that her account of what had transpired on the evening in question was corroborated to some extent by Ms Wolowolo; that R was already distressed, on the evening in question, having spilled the contents of her bedpan and having had to wait, before the claimant came into her room; that R had previously made serious complaints about treatment by her carers (not the claimant) at the Home; and that R had expressed a desire to leave the Home as she did not like being there. There was also the option of the respondent explaining to R and her children that they were faced with the dilemma of a direct conflict in the evidence and notwithstanding the seriousness of the allegations and the vulnerability of R, they also had obligations to two long-standing employees who had unblemished records; that they were unable to resolve the conflict in the evidence; that they had decided they would not dismiss either the claimant or Ms Wolowolo but at the same time they could have reassured R and her children that they would supervise the claimant and Ms Wolowolo in the future more closely, that they would ensure their contact with R was kept to a minimum and that they would so arrange the rotas that they would not be caring for her in the future .
20. In all these circumstances, I arrived at the view that it was unlikely that the claimant would have been dismissed, fairly, had the respondent followed a fair procedure, but that there was a possibility that she would have been, which I assess at 40%. The Compensatory Award falls to be reduced by that percentage, therefore, leaving an award of **£2,606.17**.
21. Accordingly, when the Basic Award of **£7,805.25** is added the total award of compensation is **£10,411.42**.

22. I might add that it was clear that the claimant's unfair dismissal caused her great worry and distress, and this was increased when the police apprehended her, took her to the police station for questioning and then released her without charge. However, I have no authority, when calculating
5 compensation in an unfair dismissal case, to make an award for injury to feelings.

23. Finally, I am pleased to record that after I had drafted this Judgment, I
10 received intimation from the respondent's solicitor that, following a Review Hearing, the SSSC had decided to impose a Temporary Conditions Order ("TCO"), with effect from 1 August 2023. I understand this to be the least restrictive Order, less restrictive than a TSO, which means that the claimant will be able to work in the care sector, subject to certain conditions which the
15 claimant has advised she is prepared to accept. The TCO will remain in place for two months. The "Impairment Hearing" is scheduled to take place between 23 and 30 August. This development does not affect my Judgment.

Employment Judge: N M Hosie

20 **Date of Judgement: 20 July 2023**

Date sent to Parties: 20 July 2023