



EMPLOYMENT TRIBUNALS

Claimant: Miss C Simmons
Respondent: Mr Panayiotis Andreou Chimonides
T/A Cutthroat Kings Barbers
Heard at: East London Hearing Centre
On: 2 November 2023
Before: Employment Judge Reid

Representation

Claimant: in person
(accompanied by her parents Mrs S Simmons and Mr D Simmons for support)

Respondent: in person (accompanied by Mr B Davis for support)

***See also attached Recoupment Annex**

JUDGMENT (Remedy)

The Respondent is to pay the Claimant the following (calculations set out in the attached schedule):

1. Unpaid wages 6 January 2020 – 2 July 2022 (non-furlough periods):

£6,734.43 (gross)

2. Unpaid wages (furlough periods):

£2,854.24 (gross)

3. Final two weeks wages 25 June 2022 to 9 July 2022:

£495.72 (gross)

4. Statutory sick pay - 24 August 2021 to 24 September 2021:

£289.05 (gross)

5. Holiday pay – 18- 25 February 2022:

£225.72 (gross)

6. Accrued but untaken holiday pay on termination:

£1951.70

7. Notice pay:

£477.98

8. (a) Basic award unfair dismissal:

£247.86

(b) Compensatory award unfair dismissal (*subject to recoupment):

£3,067.88

Total unfair dismissal : £3,315.74

9. Additional award under s38(3) Employment Act 2002:

£495.72

TOTAL £16,840.30

The amount is payable within 14 days of being sent this judgment under Rule 66 of the Tribunal Rules 2013.

***Recoupment information**

Total monetary award to Claimant: £3,067.88

The prescribed element: £2,867.88

Dates the prescribed element relates to: 11 July 2022 – 30 September 2022

The amount the monetary award exceeds the prescribed element: £200

REASONS

Background

1. This hearing was a remedy hearing to decide the amounts payable to the Claimant following my judgment sent to the parties on 16 October 2023.
2. The Claimant had prepared an updated Schedule of Loss in compliance with my previous Order. It had not been agreed with the Respondent. The Respondent today was assisted (but not represented) by Mr Davis who had been through the Claimant's updated schedule of loss and was able to agree many of the basic calculations she had set out. At the Claimant's request I discussed a number of matters on the figures with Mr Davis directly, because the Respondent said he found it difficult to deal with some of the more complex points.
3. I identified with the parties that there were three matters on which I needed to hear from them at this hearing; firstly the *Polkey* argument explained in the summary at the end of my previous judgment, secondly the possibility of an additional award under s38(3) Employment Act 2002 (also explained in that summary) and thirdly the possibility of an increase to the unfair dismissal compensation for a failure to comply with the ACAS Code of Practice. Because both sides were not legally represented I explained what the tests were for each of these three matters. I then heard submissions from Mr Davis and from the Claimant on these issues.

Relevant law

Unfair dismissal

4. The basic award is calculated under s119 Employment Rights Act 1996 and is calculated by reference to the employee's age, length of service and weekly pay (gross). When all the service is aged under 22 the rate of weekly pay is half a week's pay.
5. The compensatory award is calculated under s123 Employment Rights Act 1996 and is such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to the action of the employer. When loss of earnings is considered it is the net loss ie what the employee would actually have received.
6. An employee is under a duty to mitigate his losses by making reasonable efforts to find other work. The burden of proving a failure to mitigate is on the employer. In calculating an employee's loss this duty must be considered by the Tribunal (s123(4) Employment Rights Act 1996). In this case the Claimant had been signed off sick for her mental health so was not able to look for work.
7. It is for the employer to adduce evidence that the employee would have been dismissed in any event if a fair procedure had been followed or to support an argument that the employee would not have been employed indefinitely (a *Polkey* deduction, which involves an assessment of the percentage chance that the employee would have been dismissed in any event, or dismissed after a particular

period to allow for a fair procedure) (*Compass Group v Ayodele* [2011] IRLR 802). *Software 200 Limited v Andrews* [200] ICR 82 identified the need to consider whether it is not possible to reconstruct what might have happened such that no sensible prediction can be made.

8. s207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an award may be reduced or increased by up to 25% where there has been an unreasonable failure by a party to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015), if just and equitable in all the circumstances to do so. An increase can only be made where the Code applied to the dismissal and it does not apply where the dismissal is not for a disciplinary offence. It therefore did not apply in this claim because this was not a dismissal for a disciplinary matter.
9. The compensatory award can be increased by two or four weeks' pay when, at the time of the dismissal, the employer has not issued a legally compliant written statement of terms and conditions to the employee (s38 Employment Act 2002). If such a statement was not issued to the employee the Tribunal must award two weeks' pay. The Tribunal can instead make an award of four weeks' pay if it considers it just and equitable to do so. The Tribunal can make no award of this kind if it thinks there are exceptional circumstances which would make an award unjust or inequitable.

Relevant law holiday pay

10. Regulation 13 Working Time Regulations sets out the entitlement to 4 weeks paid leave. Regulation 13A sets out the entitlement to an additional 1.8 weeks paid leave. Regulation 16 says that a worker is entitled to a week's pay for each week of leave.
11. Regulation 14 provides for the payment of accrued but untaken holiday pay when the employment terminates during a leave year.

Reasons

12. The Respondent's case was that it was likely that after a sickness absence of 3-4 months the Respondent could fairly have dismissed the Claimant as at that point unable to support the absence further. The Claimant agreed that it would be understandable at that point if the Respondent could not continue the employment.
13. The Respondent is a very small employer of under 5 employees and I find that there is a 100% chance that the Claimant could fairly have been dismissed after 12 weeks given the Respondent's limited resources and limited ability to cope with a long absence.
14. The loss of earnings element of the compensatory award is therefore limited to 12 weeks net pay (the Polkey deduction).
15. As regards the failure to issue a written statement under s1 Employment Rights Act, (previous judgment para 11) an additional award is not payable if there are exceptional circumstances making such an award unjust or inequitable. Given the very real problems caused by the lack of a written statement of her terms being

issued to the Claimant the contents of which complied with s1 Employment Rights Act 1996, I do not find there to be any such exceptional circumstances even taking into account that the Respondent is a very small employer. He could have taken advice about the basics or done internet research about his obligations as regards issuing a written statement of the Claimant's terms to her which contained the required information under s1 Employment Rights Act 1996. I do not however make the higher award of 4 weeks pay because I take into account the Respondent is a very small employer such that it would be inequitable to penalise him to the maximum 4 weeks.

**Employment Judge Reid
Dated: 6 November 2023**

Encl: Annex – Recoupment

SCHEDULE

1. Unpaid wages 6 January 2020 – 2 July 2022 (non-furlough periods only)

(i) 6 January 2020 – 31 March 2020

351 hours x NMW £6.15 = £2158.65
Less wages paid £1,386.90
= £771.75

(ii) 1 April 2020 – 31 March 2021

405 hours x NMW £6.45 = £2,612.25
Less wages paid £1,680.75
=£931.50

(iii) 1 April 2021 – 23 November 2021

702 hours x NMW £6.56 = £
Less wages paid £3,018.60
= £931.50

(iv) 24 November 2021 – 31 March 2022

459 hours x NMW £8.36 = 3,837.24
Less wages paid £1,973.70
= £1,863.54

(v) 1 April 2022- 24 June 2022

324 hours x NMW £9.18 = £2,974.32
Less wages paid 1,393.20
= £1,581.12

Total shortfall (i)-(v) = £6,734.43

2. Unpaid wages (furlough periods only)

(i) 3 April 2020 – 31 July 2020 (18 weeks)

486 hours x NMW £6.45 = £3134.70
Less wages paid £1,654.56

= £1,480.14
80% = £1,184.11

(ii) 6 November 2020 – 4 December 2020 (5 weeks)

135 hours x NMW £6.45 = £870.75
Less wages paid £448.20
= £422.55

80% = £338.04

(iii) 25 December 2020 – 9 April 2021 (16 weeks)

432 hours x NMW £6.45 = £2,786.40

Less wages paid £1,437.48

= £1,348.92

80% = £1,079.13

(iv) 30 July 2021 – 13 August 2021 (3 weeks)

81 hours x NMW £6.56 = £531.36

Less wages paid £278.40

= £252.96

80% = £202.36

Total shortfall (i)-(iv) = £2,854.24

3. Unpaid wages 25 June 2022 – 9 July 2022 (2 weeks)

2 x £247.86 (27 hours x NMW £9.18)

= £495.72

4. Statutory sick pay 24 August 2021 – 24 September 2021 (4 weeks)

4 x £96.35 (3 qualifying days per week) = £385.20

Less SSP waiting days (3 days ie one week)

= £289.05

5. Holiday pay 18-25 February 2022 (Working Time Regulations, Reg 16)

1 x £225.72 (27 hours x NMW £8.36)

= £225.72

6. Accrued holiday pay on termination (prorated to 3 days per week) (Working Time Regulations, Reg 14)

(i) Holiday year 6 January 2020 – 31 December 2020 (11 complete months)

Basic 4 week entitlement (12 days pa) = 11 days

Additional annual leave (4.8 days pa) = 4.5 days

Total = 15.5 days

$$\begin{aligned}\text{Day's pay} &= \text{NMW } \pounds 6.45 \times 7 \\ &= \pounds 45.15 \\ 15.5 \times \pounds 45.15 &= \pounds 699.82\end{aligned}$$

(ii) Holiday year 1 January 2021 – 31 December 2021

Basic 4 week entitlement = 12 days
Additional annual leave = 4.8 days
Total 16.8 days – round up to 17

$$\begin{aligned}\text{Day's pay} &= \text{NMW } \pounds 8.36 \times 7 \\ &= \pounds 58.52 \\ 17 \times \pounds 58.52 &= \pounds 994.84\end{aligned}$$

(iii) Holiday year 1 January 2022- 9 July 2022 (6 months and one week ie 0.51% of the year)

Basic 4 week entitlement = 6.12 days rounded to 6.5 days
Additional annual leave = 2.49 days – rounded up to 2.5
Total 9 days
Less 5 days compensated above (taken but not paid)
Total 4 days

$$\begin{aligned}\text{Day's pay} &= \text{NMW } \pounds 9.18 \times 7 \\ &= \pounds 64.26 \\ 4 \times \pounds 64.26 &= \pounds 257.04\end{aligned}$$

Total (i)-(iii) £1951.70

7. Notice pay (2 weeks net pay) (s86 Employment Rights Act 1996)

$$2 \times \pounds 238.99 \text{ (27 hours } \times \text{ NMW } \pounds 9.18 \text{ less tax} = \pounds 247.86)$$

= £477.98

8. (a) Basic award unfair dismissal (s119 Employment Rights Act 1996)

Gross week's pay = £247.86
2 complete years service at half a week's pay

$$= \pounds 247.86$$

(b) Compensatory award unfair dismissal (s123 Employment Rights Act 1996)

(i) Loss of statutory rights £200

(ii) Loss of earnings: 12 weeks x net weekly pay
 $12 \times \pounds 238.99 = \pounds 2,867.88$

= £3,067.88

Total (a) +(b) = £3,315.74

9. Additional award s38(3) Employment Act 2002

Gross week's pay = £247.86

2 x £247.86 = **£495.72**

TOTAL 1-9 £16,840.30