



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Fiona Marnell

v

Hertfordshire County Council

Heard at: Remote

On: 5th December 2023 for Remedy

Before: Employment Judge R Wood;

Appearances

For the Claimant: In Person

For the Respondent: Mr A Rozycki (Counsel)

RESERVED REMEDY JUDGMENT

1. The respondent, having unfairly and wrongfully dismissed the claimant, shall pay to the claimant the sum of **£66,476.86** by way of damages.

REASONS

Claims and Issues

1. This is a claim which involves an allegation of unfair dismissal and wrongful dismissal presented by the claimant on 14th December 2022. The Tribunal's judgment on the merits of the claim having been handed down to the parties by way of extempore judgment on 6th October 2023, the Tribunal conducted a remedy hearing on 5th December 2023. On the previous occasion, the claimant was found to have been unfairly dismissed and wrongfully dismissed by the respondent.
2. The case was heard remotely via CVP. I heard from the claimant, Ms Marnell. I also heard from Miss Heidi Smith and Miss Emily Austin of the respondent. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. I also had an agreed bundle of documents.

3. I carefully considered all of the evidence submitted to me which was relevant to the question of remedy, even if a particular part of the evidence is not specifically referred to in this written decision. At the conclusion of the hearing, I reserved my decision, mainly due to lack of time.

Findings and Reasons

4. The claimant did not seek any other order save for the award of compensation. There was some agreement between the parties in relation to the relevant issues. The main outstanding issue was the claimant's net weekly wage. In particular, how it was calculated in the light of the appropriate deductions to be made for national insurance and income tax, and the claimant's pension and salary sacrifice contributions. I was also required to make findings as to the appropriate period of any award of compensation, as well as whether it was appropriate to make a finding in relation to section 207A of TULRC(A) 1992 (failure to comply with the ACAS codes).
5. The parties agreed that the claimant's gross weekly pay was £1,050.82. Further, that the appropriate basic award was **£16,273.50**.
6. So far as the compensatory award for unfair dismissal is concerned, I must award such amount as I consider just and equitable in all the circumstances (section 123 of the ERA). I heard and read evidence on this point from the claimant, who was cross-examined on the issue by Mr Kozycki. The claimant did not work again after her resignation until she found and commenced a new post beginning on 5th June 2023. This was employment of an equivalent wage. The claimant did not seek to extend her claim for loss of earnings beyond this date.
7. It was the respondent's primary case that the claimant had been slow to start any significant efforts to find alternative employment. The claimant has provided a very detailed schedule of all of the activities in which she had engaged in the course of looking for work. It was an impressive and thorough document. However, it seem to demonstrate that she had not actually applied for a position until December 2022, having been dismissed in September. The claimant accepted that this was correct. However, she explained that she had found it surprisingly challenging to re-enter the job market after 18 years. She had spent some time updating her C.V and registering with various employment agencies. The claimant stated that it had taken her some time to realise that she needed to focus her time on specialist agencies dealing solely with the public sector. She stated that her unique skills made it difficult for her to find equivalent opportunities in the private sector.
8. I accept Mr Rozycki's broad point that the claimant might have made a more efficient start to the task of finding fresh employment. Ideally, she might have commenced applying for positions before December. However, in my judgment, there was considerable mitigation of this apparent shortcoming. Firstly, I accept the argument that after 18 years of working for the same

employer, it was likely to be challenging to be back in the job market, which the claimant described as having changed considerably in that time.

9. Secondly, I also accept that an applicant of the claimant's maturity may well find that there are additional barriers to finding work. The claimant adduced some very general evidence about age discrimination, which Mr Rozycki submitted as speculative. I take his point to a degree. However, in the most general terms, I feel able to take judicial notice that age discrimination does exist, and that it may have been an issue in the claimant's case.
10. Thirdly, I take into account the claimant's health issues. I find that the claimant had a significant heart condition, which caused her to be hospitalised in December 2022. She also experienced some mental health issues. She explained that this was, in part, the result of her dismissal and the stress associated with looking for work. I find that this is more likely than not, and that it would have impeded her efforts to find work.
11. Therefore, for all of the reasons set out above, I find that there was no failure to take reasonable steps to mitigate her loss, even if one focuses on the first few months of the claimant's job search. She may not have applied for a position until December, but there is ample evidence that she was looking for an equivalent post. I accept that this was a challenging process in the circumstances.
12. In my judgment, it is more appropriate to look at the relevant period as a whole i.e. September 2022 to June 2023. The claimant was entitled to look for an equivalent role, namely one involving finance and commissioning. It was agreed by the parties during the hearing on liability that these were an unusual combination of skills and experience. It was this fact which had been the primary cause of the unfair dismissal i.e. the respondent's failure to properly pigeon hole the claimant's unique role within the new wage structure. Accordingly, it was always likely to be problematic to find a similar position with another employer.
13. Looked at as a whole, in my view it is difficult to accurately characterise the claimant's conduct as unreasonable. She had a highly paid and specialist role. She was able to find an equivalent position starting from 5 June 2023. This amounts to a period of 9 months (including the 3 month notice period). I find that there is no failure time mitigate loss in this case.
14. I then turn to the question of net weekly pay. I find that the appropriate figure for loss of net weekly is **£807.15**. The respondent's initial position on this issue had been that the appropriate figure was £677.36. However, during the course of the evidence from the claimant and Miss Smith, the parties agreed that the it was appropriate for the sum of £89 per week to be added to that figure in respect of employee contributions which had been made by the claimant to her occupational pension scheme.
15. Upon further examination, it was also agreed by the parties that the claimant had been subject to incorrect deductions of tax and national insurance. In

short, the parties agreed that the appropriate net weekly wage for the purposes of calculated compensation in this case was **£807.15**.

16. I then turn to the question of an uplift in relation to any failure to comply with the ACAS code. It was part of my findings in relation to liability that there had been failings on the part of the respondent at the point when the claimant raised a grievance. Given that there had been significant failings of fairness and transparency in terms of the re-grading process, it was my judgment that the raising of a grievance was an opportunity for the respondent to review the actions to date, and to correct the errors I have identified. Instead, the respondent chose to adopt an inflexible and unfair approach. It refused to consider her grievance, notwithstanding that she had clearly raised a fresh matter i.e. that she had been unwell at the appeal stage and claimed not to have had a reasonable opportunity to put her case. In my view, this was a breach of the ACAS code.
17. As to the appropriate uplift, I agree with Mr Rozycki that it is not the most serious breach. The primary culpability here lay in the way the re-grading process was carried out. The failure was nonetheless a contributory factor and a significant missed opportunity to avoid what I have found to be a constructive unfair dismissal. The respondent was, at the time, being told in clear terms by one of its own senior managers, that the claimant was being treated unfairly, and that there was a risk she would resign as a result. Accordingly, I find that the appropriate uplift is 10%.
18. It follows that damages for wrongful dismissal were agreed at £10,492.95, this being damages for failure to make payments in respect of the three month notice period to which the claimant was entitled upon dismissal. Applying the ACAS uplift, this comes to **£11,542.25**.
19. The basic figure for compensation over a further period of 6 months post notice period is $£807.15 \times 26 \text{ weeks} = £20,985.90$. Applying the 'Polkey' deduction of 20% from my previous judgment, this comes to £16,788.72. Then applying the ACAS uplift, it comes to **£18,467.59**.
20. The claimant's weekly employer contributions to her occupational pension scheme were agreed at £216. The loss of these contributions over a period of 9 months (September to June) is $£216 \times 39 = £8,424$, minus 'Polkey' deduction = £6,739.20, plus the ACAS uplift = **£7,413.12**.
21. The parties agreed that the claimant should recover compensation in respect of lost tax benefits which would have accrued from the respondent's salary sacrifice scheme. The claimant was cross-examined about this by Mr Rozycki. However, in submissions, he very reasonably accepted, on the respondent's behalf, that it was more likely than not that the claimant would have continued to pay into the scheme, and at the rate at which she had been doing so at the time of her dismissal. It was agreed that the claimant should recover a further net weekly sum of £147 to cover the lost weekly tax benefits which would have arisen from the scheme. The compensation under this head is therefore calculated as $£147 \times 39 \text{ weeks} = £5733$, minus

the 'Polkey' deduction which comes to £4586.84, plus the ACAS uplift which comes to **£5,045.04**.

22. I also award the claimant the sum of £500 in respect of loss of statutory protection, with 'Polkey' deduction, and ACAS uplift, this comes to **£440**.
23. The award then must be grossed up to have regard to the claimant's tax liability for sums in excess of £30,000.

Basic award = £16,273.50

Compensation (inc for dismissal) = £42,908.

£30,000 - £16,273.50 = £13,726.50

Therefore, the taxable amount is 42,908 - 13,726.50 = £29,181.50

Adopting a tax rate of 20%, the grossed up figure is:

$£29,181.50 / 0.8 = £36,476.86$

Total compensation is £36,476.86 + £13,726.50 = £50,203.38

Total award is therefore:

$£50,203.38 + £16,273.50$ (basic award) = **£66,476.86**.

FINAL AWARD OF COMPENSATION =£66,476.86

Employment Judge R Wood

Date: 18th December 2023.....

Sent to the parties on: 19 January 2024

For the Tribunal Office