



EMPLOYMENT TRIBUNALS

Claimant

Ms L Delagua

Respondent

By Your Side Ltd

v

Heard at:

Reading

On: 8 November 2023

Before:

Employment Judge Hawksworth
Mr P Hough
Ms B Osborne

Appearances

For the claimant:

represented herself with support from Ms E Sterba

For the respondent:

Ms B Omotosho (solicitor)

RESERVED JUDGMENT (REMEDY)

The unanimous decision of the tribunal is that:

1. The respondent must pay the claimant the sum of £11,827.48 by way of compensatory award for unfair dismissal. No basic award is payable.
2. Regulation 4(3) of The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 applies to this judgment:
 - a. The monetary award: a compensatory award of £11,827.48.
 - b. The amount of the Prescribed Element: £11,662.48.
 - c. The dates of the period to which the Prescribed Element relates: 7 May 2022 to 28 October 2022 (Benefit: Universal Credit)
 - d. The amount, if any, by which the monetary award exceeds the Prescribed Element: £165.

REASONS

Claim, hearings and evidence

1. The claimant worked for the respondent as a care practitioner from 28 October 2021.
2. The claim form was presented on 28 April 2022 after Acas early conciliation from 10 March 2022 to 21 April 2022. The claimant claimed protected disclosure detriment and unauthorised deduction from wages while suspended. The respondent presented its response on 17 June 2022. The respondent defended the claim.
3. After the claimant presented her claim, she was dismissed by the respondent on 6 May 2022. On 20 March 2023, she was given permission to amend her claim to include a complaint of automatic unfair dismissal because of making protected disclosures.
4. There was a preliminary hearing for case management on 14 December 2022 at which the issues for the tribunal were identified.
5. The liability hearing took place in person over three days from 19 June to 21 June 2023. We gave judgment on liability with reasons at the hearing on 21 June 2023.
6. The unanimous decision of the tribunal was that the complaint of unfair dismissal because of making a protected disclosure succeeded. The complaints of detriment on the ground of making a protected disclosure and of unauthorised deduction from wages failed and were dismissed.
7. We arranged a date for the remedy hearing and made case management orders for that hearing.
8. Written reasons on liability were provided on 31 August 2023.
9. For the remedy hearing, there was an agreed bundle of 159 pages which included the claimant's original and updated schedules of loss. In these reasons we refer to pages in that bundle by page number.
10. The respondent's representative provided written submissions on remedy and a counter-schedule of loss.
11. At the remedy hearing, after reading and dealing with the preliminary matters, we heard evidence from the claimant and for the respondent Mrs Parkins. Both had prepared and served witness statements. We also had short written witness statements from the claimant's partner Ms Sterba, the respondent did not have any questions for her, and from the claimant's father Ken Delagua. We heard submissions from both parties.
12. After the evidence and submissions at the remedy hearing we reserved judgment because there was insufficient time. The judge apologises for the

delay in promulgation of this reserved judgment. The parties have been told the reason for the delay.

The Issues

13. The claimant did not seek reinstatement or reengagement. The central issue for the tribunal to decide at this hearing is the compensation the claimant should be awarded for her complaint of unfair dismissal. (Her other complaints did not succeed.)
14. The issues to be decided to determine remedy were set out in the case management orders for the remedy hearing made on 21 June 2023 (page 47 and 48 of the remedy bundle).

Findings of fact

15. We record here the relevant findings of fact from our liability decision, and additional findings of fact we have made based on the evidence we heard and read at the remedy hearing.
16. The claimant worked for the respondent from 28 October 2021 to 6 May 2022, a little over 6 months, as a domiciliary care worker working sleeping night shifts. Her usual shifts were 12 hours a night, four days a week.
17. During the period from 24 February 2022 to 6 May 2022, the claimant did not work her usual shifts for the respondent because a disciplinary investigation was being carried out and she was asked not to work for her regular client.
18. The respondent's calculation of the claimant's gross annual pay was £23,873.16. The respondent's calculation of net weekly pay (based on the claimant's pay during the 12 week period when she was working her usual shifts, and factoring in advance payments made) was £384.54.
19. From May 2022, the respondent increased its hourly rates by £1.00 per hour, or about 10%.
20. We found that the claimant made six protected disclosures. We found that the claimant felt that the things she was raising were matters of public interest and we found that her belief was reasonable. We find that although these disclosures were made in the context of the investigation and allegations against her, they were not made for any improper purpose and were made in good faith.
21. We find that Mrs Parkins and the claimant had to some extent a clash of personalities and this did not make for an easy working relationship (even leaving aside the matters which formed the basis of the claimant's allegations).
22. The disciplinary process the respondent used broadly followed the Acas Code of Practice. It took from 21 February 2022 to 6 May 2022. The claimant had an investigatory meeting, a disciplinary meeting and was given

a right to appeal. The invitation letters informed the claimant about the allegations against her, told her about the right to be accompanied and the invitation to the disciplinary hearing told her that there was a risk of dismissal. However, there was a failure to provide the claimant with a copy of the statement of her colleague on which the allegations against her were based, because of a miscommunication between Mrs Parkins and the respondent's HR officer.

23. During the disciplinary process, the claimant was asked by the respondent not to contact her regular client or their family. Although the claimant did not initiate any contact with her client's family, she responded to communications from them during this time.
24. From about April 2022 the claimant spent most of her time at her partner's in Kent and she has now moved to Kent. She started applying for jobs from about this time and we find she was taking steps to find alternative work, for example she applied for 23 jobs in the period to August 2022.
25. The claimant was dismissed on 6 May 2022. After her dismissal the claimant accessed the respondent's online system. She did so to show that the respondent was not complying with data protection requirements.
26. In June 2022 after her dismissal the claimant experienced a dip in her mental health and her GP increased the dose of her medication (page 130).
27. The claimant was in receipt of universal credit from 17 August 2022 (page 132). During the period from 17 August 2022 to 28 October 2022 she received £886.48.

The law

Unfair dismissal compensation

28. Section 118 of the Employment Rights Act 1996 provides that compensation for unfair dismissal consists of:
 - 28.1 A basic award; and
 - 28.2 A compensatory award.
29. The amount of the compensatory award is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal, in so far as that loss is attributable to action taken by the respondent (section 123(1)).
30. In Chief Constable of Northumbria Police v Erichsen (UKEAT/0027/15/BA), the EAT explained that when assessing what would have happened in the past upon a contingency, the tribunal must make an assessment of relevant chances and factor that assessment into the calculation. The question is not whether an event is or would be more likely than not to occur. In employment cases the question often arises in the context of dismissal: would the employee have been dismissed at some stage even without the unfair

dismissal for which compensation is to be awarded? This question is to be assessed by an assessment of the chances, and:

“Application of the principle may involve the application of a percentage, upwards or downwards (as in many Polkey cases), to reflect the Employment Tribunal's assessment of the chance, but it is important to appreciate that the application of a percentage is not the only way of reflecting a chance. Suppose the question is whether an employee would have continued in a particular job for a number of years. There may be a number of realistic chances bearing on that assessment. The best way - indeed often the only practicable way - of expressing the result of the assessment will be to say that the employee would have remained in employment for X years, taking into account the various chances.”

Conclusions

31. We applied the legal principles to the facts as we found them, and reached the following conclusions.

Basic award

32. The claimant had less than one year's service by the time of her dismissal. She has not claimed a basic award. No basic award is payable.

Compensatory award – prescribed element

33. Financial losses and chance of termination of employment in any event: To decide what loss of earnings are attributable to the unfair dismissal, we have to decide how long the claimant would have remained employed by the respondent if she had not been unfairly dismissed. Our assessment is that if she had not been unfairly dismissed, the claimant would have remained employed by the respondent until 28 October 2022. In other words, the claimant would have worked for the respondent for a year in all. We made this assessment by taking into account in the chance that:

- 33.1 the claimant could have been fairly dismissed in any event because of the concerns the respondent had about her communications with her customer's family and accessing the respondent's system after she left (these matters were not dealt with as part of the disciplinary process we were considering);

- 33.2 the claimant may have decided to leave her job because of the issues with her working relationship with Mrs Parkins; and

- 33.3 the claimant may have decided to move to Kent.

34. The claimant has therefore suffered loss of earnings from 7 May 2022 to 28 October 2022, a period of 25 weeks.

35. We make our award by reference to net losses. We accept the respondent's calculation of net weekly pay based on the claimant's pay prior to being

asked not to undertake her usual shifts (adjusted to take account of advances). It would not be just and equitable to base our calculation of weekly loss of pay on the period when the claimant was not working because of the disciplinary process. The claimant's net weekly earnings with the respondent were £385.54.

36. We apply a 10% increase to the figure for net weekly pay to reflect the respondent's pay increases which were applied from May 2022. The claimant's weekly net loss of earnings from 7 May 2022 was therefore £424.09.
37. Total loss of earnings is therefore 25 weeks x £424.09 = £10,602.25.
38. Reasonable steps to replace lost earnings: The claimant did not have any earnings from alternative employment during this period. She did not, however, fail to mitigate her losses. She has demonstrated that she was looking for work and making applications during the relevant period. It was not unreasonable to make fewer applications around June 2022 when she had health issues.
39. Acas Code: We apply an uplift of 10% to this figure to reflect the respondent's failure to provide the claimant with a copy of the witness statement on which the allegations against her were based. This was a failure to comply with paragraph 9 of the Acas Code which says that it would normally be appropriate to provide copies of written evidence, which may include witness statements, with the notification of disciplinary meeting. There was no reason not to provide the witness statement with the employee's name redacted. This was an unreasonable failure. The claimant should have been made more fully aware of the basis of the allegations against her.
40. Contributory fault: The respondent did not suggest that there should be any reduction for contributory fault, and we do not make any reduction for this.
41. Bad faith: we have not found that the claimant's protected disclosures were made in bad faith. We make no reduction under this heading.
42. The total prescribed element is £10,602.25 x 1.10 to include Acas uplift = £11,662.48.

Non-prescribed element

43. We do not make any award for future losses, because of our assessment that the claimant would have left the respondent's employment on 28 October 2022.
44. The claimant did not make a claim for any other loss of benefit, pension or expenses. For unfair dismissal compensation, the tribunal does not have the power to make any award in respect of interest prior to the date of the award, or any compensation in respect of injury to feelings.

45. The claimant did not have two years service and had not acquired all statutory employment rights such as the right not to be unfairly dismissed (her claim succeeded because it was a claim of 'automatic' unfair dismissal for which there is no qualifying period of employment required.)
46. However, as an employee with a little over 6 months' service, she had acquired some statutory rights such as the right to minimum notice and the right to request flexible working. We award £150 in respect of the loss of these statutory rights.
47. We apply the same uplift to the non-prescribed element in respect of the failure to comply with the Acas Code: £150 x 1.10 to include Acas uplift = £165.
48. The total compensatory award is £11,662.48 plus £165 = £11,827.48. The award is below the statutory cap (this is the legal maximum award) and so no reduction needs to be made for that.
49. No tax is payable on the award as it is a payment on termination of employment below the £30,000 threshold.

Recoupment and summary

50. No deduction has been made for the £886.48 which the claimant received by way of universal credit during the period in respect of which we have made an award for loss of earnings. This is because regulation 4(3) of the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 applies.
51. Any reduction of the award to take account of the universal credit received by the claimant during the relevant period will be made by the respondent following any notification received from the DWP.
52. For recoupment purposes:
 - 52.1 The monetary award: a compensatory award of £11,827.48.
 - 52.2 The amount of the Prescribed Element: £11,662.48.
 - 52.3 The dates of the period to which the Prescribed Element relates: 7 May 2022 to 28 October 2022 (Benefit: Universal Credit)
 - 52.4 The amount, if any, by which the monetary award exceeds the Prescribed Element: £165.

Reference

53. The tribunal does not have the power to order the respondent to provide a reference to the claimant. We note however that during her evidence Mrs Parkins said she was willing to give the claimant a reference. We hope this will allay the concerns the claimant expressed about references for future employment applications.

Employment Judge Hawksworth

Date: 14 February 2024

Sent to the parties on:20 February 2024.

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For the Tribunal Office