EMPLOYMENT TRIBUNALS

Claimant: Mrs S Hogson
Respondent: South Elmsall Community Facilities Ltd

Heard: in Leeds

On: 26 February 2024

Before: Employment Judge Ayre

Representation

Claimant: Ms L Taleb, counsel
Respondent: Did not attend and was not represented.

JUDGMENT

1. The claim for unfair dismissal is well founded. The claimant was unfairly dismissed by the respondent.

2. The claim for wrongful dismissal is well founded. The respondent breached the claimant's contract of employment by dismissing her without notice or payment in lieu of notice.

3. The respondent is ordered to pay the sum of £17,918.57 to the claimant.

REASONS

Background

1. On 6 October 2023 the claimant issued a claim in the Employment Tribunal following a period of early conciliation that started on 28 July 2023 and ended on 8 September 2023. The claim form includes claims of unfair dismissal and for notice pay.

2. By letter dated 6 November 2023 the claim was sent to the respondent at the following address: 122 Westfield Lane, Pontefract, West Yorkshire, WF9 2EF. The

deadline for filing the response was 4 December 2023.

3. No response has been received to the claim. The Tribunal wrote again to the respondent on 8 January 2024 informing the respondent that in accordance with Rule 21 of the Employment Tribunal Rules of Procedure, because the respondent has not entered a response, the respondent may only participate in any hearing to the extent permitted by the Employment Judge who hears the case.

4. A search of Companies House reveals an entry for a company named South Elmsall Community Facilities Ltd, company number 08280942, with a registered office at 122 Westfield Lane, South Elmsall, Pontefract, West Yorkshire, WF9 2EF. The company appears to be active and the nature of the business is stated as being 'combined facilities support activities'.

The hearing

5. In preparation for today's hearing the claimant had prepared a witness statement and a bundle of documents running to 155 pages. Within the bundle was a contract of employment for the claimant listing the claimant's employer as South Elmsall Community Facilities Limited. The claimant had also produced a Schedule of Loss.

6. I heard evidence from the claimant and submissions from her representative.

7. The respondent did not attend the hearing, submit any evidence or play any part in the proceedings.

The issues

8. The issues that fell to be determined at the hearing today were the following:

    - Was the claimant unfairly dismissed by the respondent?

    - Was the claimant wrongfully dismissed by the respondent?

    - What sums, if any, should the respondent be ordered to pay to the claimant?

9. At the start of the hearing Ms Taleb indicated that the claimant was not pursuing any claim for pension loss.

Findings of fact

10. The claimant was employed by the respondent as a Nursery Manager from 19 February 2018 until 2 May 2023 when she was dismissed with immediate effect. The claimant was not given notice or paid in lieu of notice.

11. On 8 March 2023 the claimant was suspended and told that she was the subject of an investigation into three separate allegations of wrongdoing. On 24 March 2023 the respondent wrote to the claimant inviting her to an investigation meeting on 4 April and advising her of her right to bring either a trade union representative or a

work colleague to the meeting.

12. The claimant attended the investigation meeting on 4 April with a trade union representative and was asked about the three allegations. She had the opportunity to put her version of events to the respondent.

13. On 20 April 2023 the respondent wrote to the claimant inviting her to a disciplinary hearing on 2 May 2023. The claimant was warned in this letter that a potential outcome of the meeting may be her dismissal.

14. The disciplinary hearing took place on 2 May. The claimant attended and was accompanied by an officer from her trade union, Unison. The claimant provided an explanation for each of the allegations that was put to her. Notwithstanding that, the respondent decided to dismiss her with immediate effect. The respondent wrote to her informing her of her dismissal in writing.

15. The claimant was informed of her right of appeal and exercised that right. An appeal hearing took place on 7 June 2023, but the claimant's appeal was not upheld.

16. The claimant was born on 16 April 1957. At the time of her dismissal she was 66 years old and had 5 complete years' service. She was paid £420 a week gross and £344.60 a week net.

17. The claimant's contract of employment contained the following clause headed "Notice of Termination of Employment":

"***During probationary period***

Either party may terminate the contract of employment by giving 1 weeks' notice.

After completion of probationary period

The length of notice which you are obliged to give to the Company to terminate your employment is four weeks in writing.

The length of notice which you are entitled to receive from the Company to terminate your employment is four weeks in writing."

18. Had she not been dismissed; the claimant had intended to work until her 67th birthday. Since her dismissal the claimant has not looked for alternative work, but has drawn her pension

The Law

Unfair dismissal : misconduct cases

19. In an unfair dismissal case, such as this one, where the respondent dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996.

20. Section 98(1) provides that: "*In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show – (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

21. The burden of establishing a fair reason for dismissal lies with the respondent. If it discharges that burden, the Tribunal will then go on to consider whether the dismissal was fair or unfair within the meaning of section 98(4) of the Employment Rights Act 1996.

22. Section 98(4) states as follows:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) Shall be determined in accordance with equity and the substantial merits of the case. "

23. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant.

Wrongful dismissal

24. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623 gives Tribunals the power to hear claims for breach of a contract of employment or other contract connected with employment where the claim arises or is outstanding on the termination of the claimant's employment.

25. In a wrongful dismissal claim, where the claimant was not given notice or paid for her notice period, the question is whether the claimant was in repudiatory breach of her contract of employment such that the employer was entitled to dismiss her without notice.

26. In a wrongful dismissal case questions of reasonableness do not arise, and the issue is whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract (***Enable Care and Home Support Ltd v Pearson EAT 0366/09***).

Statutory minimum notice period

27. Section 86 of the Employment Rights Act 1996 sets out the rights of employees to minimum periods of notice. It provides as follows:

"*(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –*
(a) is not less than one week's notice if his period of continuous employment is less than two years,
(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and
(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more….

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice….

(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

ACAS Uplift and Compensatory Award

28. Section 123 of the Employment Rights Act 1996 provides, in relation to compensatory awards for unfair dismissal, that:

> "*(1) Subject to the provisions of this section and sections 124, 124A 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….*
>
> *(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…"*

1. In ***Gardiner-Hill v Roland Berger Technics Ltd [1982] IRLR 498*** the EAT held that there are three questions that a Tribunal should consider when dealing with allegations of failure to mitigate, and that the burden of proof is on the employer in respect of each:

    a. What steps was it reasonable for the claimant to take to mitigate her loss?

    b. Did the claimant take reasonable steps to mitigate her loss? And

c. If the claimant had taken those steps, to what extent would she have mitigated her losses?

2. The starting point, when calculating the compensatory award, is that the Tribunal should assume that the claimant has taken all reasonable steps to mitigate. Mr Justice Langstaff, who was at the time President of the EAT, summarised a number of principles for Tribunals to apply when considering questions of mitigation, in the case of ***Cooper Contracting Ltd v Lindsey [2016] ICR D3***. Those principles include the following:

   a. The burden of proving a failure to mitigate lies with the employer;

   b. If the employer does not adduce evidence that the claimant has failed to mitigate, the Tribunal is not obliged to look for such evidence or draw inferences;

   c. The employer must prove that the claimant has acted unreasonably. The claimant does not have to establish that she acted reasonably;

   d. Tribunals should not apply too demanding a standard on the claimant, and the claimant should not be 'put on trial' as if the losses were her fault;

   e. It is for the 'wrongdoer' to show that the claimant has acted unreasonably by failing to mitigate her losses.

3. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

   "*… (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –*

   (a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
   (b) The employer has failed to comply with that Code in relation to that matter, and
   (c) That failure was unreasonable,

   the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%..."

4. A tribunal may only make an adjustment under section 207A if it makes an express finding that a failure to follow the Code was unreasonable (***Kuehne and Nagel Ltd v Cosgrove EAT 0165/13***). Not every breach of the Code or finding of unfair dismissal will warrant an adjustment. Similarly, a failure by an employer to follow its own disciplinary procedures will not necessarily mean that there has been a breach of the Code.

5. In ***Lawless v Print Plus EAT 0333/09*** Mr Justice Underhill, who was at the time President of the Employment Appeal Tribunal, suggested (albeit in the context of the former statutory disciplinary and grievance procedures) that relevant circumstances to be taken into account by a Tribunal when deciding whether to exercise its discretion and make an uplift, should always include whether:

    a. The procedures were applied to some extent or were entirely ignored;

    b. The failure to comply was inadvertent or deliberate; and

    c. There were circumstances that mitigate the blameworthiness of the failure to comply.

6. The size and resources of the employer can also be a relevant factor.

7. More recently in the case of ***Slade and another v Biggs and others [2022] IRLR 216*** the EAT laid down a four-stage test for Tribunals to follow when considering whether to make an uplift:

    a. Is the case such as to make it just and equitable to award an uplift?

    b. If so, what would be a just and equitable percentage uplift in all the circumstances?

    c. Does the uplift overlap with other general awards such as injury to feelings and, if so, what adjustment should be made to avoid double counting?

    d. Applying a final 'sense check', is the sum of money represented by the percentage uplift disproportionate in absolute terms and, if so, what further adjustment should be made?

Conclusions

29. The respondent has not presented a response to the claim. It did not attend the hearing today, adduce any evidence, or send in any representations. It has played no part whatsoever in the Employment Tribunal proceedings.

30. The burden of proving a fair reason for dismissal lies with the respondent. It has not discharged that burden. Accordingly I find that the claimant was unfairly dismissed. I accept the claimant's evidence that she provided an explanation for all of the allegations that were put to her.

31. I also find that the claimant was wrongfully dismissed. She did not commit gross misconduct or a fundamental breach of her contract of employment. Accordingly the respondent was in breach of contract when it dismissed her without notice of

payment in lieu of notice. Although the claimant's contract of employment provided for a notice period of four weeks, that period is less than the statutory minimum notice period set out in section 86 of the Employment Rights Act 1996. The statutory minimum notice period overrides the contract in these circumstances.

32. As the claimant had five complete years of service, she is entitled to five weeks' notice under section 86. The damages for the respondent's wrongful dismissal of the claimant therefore amount to 5 weeks at her net weekly pay of £344.60. This gives a total award for wrongful dismissal / notice pay of (5 x 344.60) **£1,723**.

33. The basic award to which the claimant is entitled, given her age (66) and her length of service (5 years) is 7.5 weeks' gross pay, a total of **£3,150** (7.5 x £420).

34. In relation to the compensatory award, I find that the appropriate amount for loss of statutory rights, given the claimant's age, length of service and the fact that she only intended to work for another year, is £400.

35. I also award the claimant loss of earnings from 6 June 2023, the date upon which her notice period (for which she has been compensated by way of damages for wrongful dismissal) would have expired, to today. This is a total of 37 weeks and 6 days, which gives the following amounts:

- £344.60 (a week's net pay) x 37 = £12,750.02; plus
- 6/7 x £344.60 = 295.37

Total loss of earnings (12,750.02 + 295.37) = £13,045.57

36. I have decided, on balance, not to make an award for future loss. The reasons for this are that the claimant chose, following her dismissal, to bring forward her retirement, and to draw her pensions, rather than to look for alternative work. I do not find that the claimant has failed to mitigate her losses, but I find that, in light of the fact that no deduction has been made from lost earnings either in respect of any possible failure to mitigate or in respect of the pension she has received, it would not be just and equitable to make any award in respect of future loss.

37. The total unfair dismissal compensatory award therefore is £13,445.57

38. I have considered whether to award an uplift in compensation for noncompliance with the ACAS Code. Ms Taleb submitted that the respondent had not complied with the ACAS code because one of the allegations put to the claimant related to an incident that had occurred in November 2022. I am not persuaded by her submission on this issue.

39. The ACAS Code, provides in summary, that:

- Disciplinary issues should be dealt with promptly and without unreasonable delay;
- Employers should act consistently;

- Employers should carry out necessary investigations to establish the facts of the case;

- Employers should inform employees of the basis of the problem and give them an opportunity to put their case before any decisions are made;

- Employers should allow employees to be accompanied at any formal disciplinary meeting; and

- Employers should allow an employee to appeal against any formal decision made.

40. I accept that this is a case to which the ACAS Code of Practice on Disciplinary & Grievance Procedures apply. It cannot be said however that there was any egregious breach of the Code. On the contrary, the respondent appears to have taken steps to comply with the Code. The respondent does appear to have acted promptly when all of the allegations came to light.

41. The claimant was informed of the allegations against her and had the opportunity to respond to them and put her version of events at an investigation meeting. She was informed in writing of the outcome of the disciplinary hearing and had the opportunity at appeal. She was allowed to be accompanied at meetings.

42. In these circumstances it would not, in my view, be just and equitable to award an uplift. This is a case in which the basic requirements of the ACAS Code were complied with.

43. The total award to the claimant is therefore as follows:

- Notice pay £1,723; plus

- Basic award £3,150; plus

- Compensatory Award – £13,445.57

Total = **£17,918.57**

44. The respondent is therefore ordered to pay the sum of £17,918.57 to the claimant.

Employment Judge Ayre

Date: 26 February 2024

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