



EMPLOYMENT TRIBUNALS

Claimant: Mrs J R Derucka

Respondent: Evolve Operational Logistic Limited

Heard at: Leicester Employment Tribunal **On:** 20 August 2024

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Miss I Kowaleska, niece and representative

Polish Interpreter: Ms M Niedziolka

Respondent: Mr C Ilangaratne, Counsel

RESERVED REMEDY JUDGMENT

1. The respondent must pay the claimant compensation and damages assessed in the total gross sum of **£7,467.18**, made up as follows:
 - a) Unfair dismissal compensation of £6,881.08, consisting of:
 - i) a basic award of £3,223.65; and
 - ii) a compensatory award of £3,657.43;
 - b) Unlawful deductions from wages for the period 25 September 2023 to 18 October 2023 in the gross sum of £586.10.
2. The Employment Protection (Recoupment of Jobseeker's Allowance & Income Support) Regulations 1996 do not apply.
3. No award is made in respect of injury to feelings for race discrimination and/or automatic unfair dismissal for making protected disclosures.

RESERVED REASONS

Background

1. The claimant brought claims of unfair dismissal, race discrimination, unlawful deductions from wages and automatic unfair dismissal for whistleblowing. The claim form was presented on 8 January 2024 following a period of early conciliation from 27 October to 8 December 2023.
2. No response was received to the claim and, therefore, Judgment was entered for all of the claimant's claims by Employment Judge Hutchinson under rule 21 of the Employment Tribunals Rules of Procedure 2013 ('ET Rules') on 14 May 2024.
3. No application for reconsideration and/or appeal were made concerning this Judgment. Therefore, liability was given in favour of the claimant for all of her claims and the case was listed for a remedy hearing before me.

Today's hearing

4. The claimant provided a paginated bundle of documents for today's hearing well in advance of the remedy hearing. These had been provided to the respondent. The respondent sent two bundles of documents to the tribunal at 5.45pm on the eve of the hearing. The claimant objected to their inclusion. Having heard representations from both sides, I did not give leave for the respondent to adduce these additional documents, many of which were already within the claimant's bundle and/or attached to her ET1 claim form. Reasons were given orally during the hearing.
5. The respondent sought leave to be able to make submissions on remedy to the Tribunal. The claimant objected to the respondent's involvement. Having heard

from both sides and considered the authority relied upon by the respondent (Office Equipment Systems Ltd v Hughes [2018] EQCA Civ 1842), I gave leave to the respondent for his Counsel to make representations on remedy. The respondent did not seek leave to cross examine the claimant. Reasons were given orally for this.

6. This was an attended hearing, held in person. The claimant was represented by her niece and supported by a Polish interpreter.
7. The claimant had provided written statements from a number of individuals. Other than her niece, Ms Iwona Kowaleska, the other individuals did not attend to give oral evidence to the Tribunal, so I attached such weight to their evidence as I considered appropriate in the circumstances.
8. I heard oral evidence from the claimant and Ms Iwona Kowaleska and found them to be honest and credible witnesses.
9. The claimant had sent into the Tribunal a USB stick which was a recording of the claimant's appeal meeting. However, she was informed that it was not possible for the Tribunal to play the recording and it would not assist in considering the appropriate remedy to award the claimant.

Findings of fact

10. The claimant's evidence was that her weekly pay was £429.82 prior to her dismissal. Further that, on 6 April 2024, her weekly pay would have increased to £471.90 gross in light of the National Minimum Wage increasing. The respondent contended in submissions that the claimant's pay was an average of £337 per week as they had calculated this using her annual salary. However, there was no evidence before me concerning this, and I therefore accept that the claimant's

basic pay was £429.82 a week and that this would have risen to £471.90 a week from 6 April 2024.

11. The claimant was employed from June 2018 until her dismissal on 18 October 2023. Therefore, she had 5 complete years' service with the respondent at the point of her dismissal. The claimant was 54 years old at the time of her dismissal.
12. The claimant obtained alternative employment through an agency from 16 November 2023, and she continues to be so employed. However, she earns less than that previously earned by the claimant before her unfair dismissal due to the number of hours available for her to work.
13. The claimant had provided evidence of the earnings she received from her new role from 8 December 2023 onwards (paid on 15 December 2023), but had not provided evidence of her earnings from the new role covering the period 16 November to 7 December 2023. Therefore, the claimant confirmed that she should be treated as if there were no losses for this three-week period.
14. The claimant had provided evidence of the shortfall between the date of her dismissal and 14 May 2024, the date on which Judgment on liability was given. However, she had provided no evidence of her earnings since 14 May 2024, and was unable to give any evidence of what she has earned since then. She therefore confirmed during the hearing that she was not claiming any ongoing loss of earnings from 14 May 2024, as she could not prove what they were.
15. The claimant's shortfall in wages between what she would have earned with the respondent had she not been unfairly dismissed and 14 May 2024 amount to £3,157.43. This is made up as follows:
 - a) The sum of £1,719.28 for the period 19 October 2023 (the day after her dismissal) until 15 November 2023 (inclusive);

b) The sum of £1,438.15 for the period 8 December 2023 until 14 May 2024.

16. The claimant's evidence, from her niece and from the other witness statements within the bundle (and for which I have attached such weight as I consider appropriate), showed the profound effect that the allegations for which the claimant was dismissed (namely allegations of racism by the claimant) and the claimant's dismissal had had upon her. Despite there being no medical evidence to support this, I accept that the effect of these allegations and ultimately her dismissal for them has negatively impacted upon her.

Law

17. I had regard to the Employment Tribunal Rules of Procedure 2013, particularly rule 21 which provides:

"21 Effect of non-presentation or rejection of response, or case not contested

(1) Where on the expiry of the time limit in rule 16 no response has been presented, or any response received has been rejected and no application for a reconsideration is outstanding, or where the respondent has stated that no part of the claim is contested, paragraphs (2) and (3) shall apply.

(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone. Where a Judge has directed that a preliminary issue requires to be determined at a hearing, a judgment may be issued by a Judge under this rule after that issue has been determined without a further hearing.

(3) *The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge.*

18. Compensation for unfair dismissal is set out in the Employment Rights Act 1996 ('ERA').

19. Section 119 ERA provides: "**Basic award**

(1) *Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—*

(a) *determining the period, ending with the effective date of termination, during which the employee has been continuously employed,*

(b) *reckoning backwards from the end of that period the number of years of employment falling within that period, and*

(c) *allowing the appropriate amount for each of those years of employment.*

(2) *In subsection (1)(c) "the appropriate amount" means—*

(a) *one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one...*

20. Section 122 ERA provides: **Basic award: reductions**

"(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

21. Section 123 ERA: "**Compensatory award**

(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.

(2) *The loss referred to in subsection (1) shall be taken to include—*

(a) *any expenses reasonably incurred by the complainant in consequence of the dismissal, and*

(b) *subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.*

...

(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 or (as the case may be) Scotland.*

...

(6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding...*

22. When assessing compensation for unfair dismissal, the Tribunal must consider the possibility that the claimant's employment would have come to an end in any event. In Polkey v A E Dayton Services Ltd [1998] ICR 142 the House of Lords held that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

23. For compensation relating to discrimination, I had regard to the Equality Act 2010 ('EQA 2010'). Section 124 EQA 2010 provides: "**Remedies: general**

(1) *This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*

(2) *The tribunal may—*

(a) *make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*

(b) *order the respondent to pay compensation to the complainant;*

(c) *make an appropriate recommendation."*

24. I note that awards for injury to feelings are compensatory and must be directly attributable to the act of discrimination. They should be just to both parties, fully compensating the claimant, (without punishing the respondent) for unlawful discrimination for which the respondent is liable. Awards that are too low would diminish respect for the policy underlying anti-discrimination legislation. However, excessive awards could also have the same effect.

Conclusions

Compensation for unlawful deductions from wages

25. I am satisfied that the claimant suffered losses in her wages from the date of her suspension (28 September 2023) until her dismissal on 18 October 2023 in the sum of £586.10.

26. This claim formed part of the ET1 claim form in which she claimed, "*other payments*" and which were included in the document "*The Proposal for Financial Settlement (financial compensation) from the Respondent*" attached to her claim form. I therefore find that the Judgment provided by Employment Judge

Hutchinson on 14 May 2024 included a claim for unlawful deductions from wage and award the claimant the gross sum of £586.10 for this.

Compensation for unfair dismissal

27. The claimant is entitled to a basic award based upon her 5 years' service all over the age of 41. Her entitlement to a basic award is therefore $7.5 \times £429.82$ (being her gross weekly wage). She is therefore awarded a basic award of £3,223.65.
28. The only possible deduction from this would be if I found that the claimant committed conduct before the dismissal such that it would be just and equitable to reduce the basic award to any extent. The respondent contended that I should consider the reason for the claimant's dismissal as sufficient evidence of her conduct to make a reduction in the basic award under section 122 ERA.
29. I do not consider it just and equitable to make any such reduction in the basic award. The respondent wished me to consider the minutes of the appeal hearing (which were included as an attachment to the ET1 claim form), in which they show that the claimant discussed black people and/or new starters being slower on the production lines and reference to calling people "bamboo". However, the responses in the minutes are not, in my view, sufficiently clear to show that the claimant's conduct was such as to render it just and equitable to reduce the basic award as suggested by the respondent.
30. Turning to the compensatory award, I am satisfied that the claimant received no income from the date of her dismissal until 16 November 2023, when she commenced her new employment. Once she obtained her new employment, there remained a shortfall in the wages she obtained and the wages she would have received from the respondent. Therefore, I award her loss of earnings in the total sum of £3,157.43.

31. I award £500 for the loss of the claimant's statutory rights, reflecting that it will take the claimant some years before she can claim unfair dismissal and/or redundancy pay from a new employer. I do not accept the respondent's assertion that this should be limited to £350.
32. Even though the claimant was successful in her claim for automatic unfair dismissal for having made protected disclosures, there is no award for injury to feelings for unfair dismissal compensation, including when the dismissal is automatically unfair for making protected disclosures. Therefore, the compensation for automatic unfair dismissal for having made protected disclosures is the same as for ordinary unfair dismissal, and therefore is as set out above. Whilst the statutory cap on the compensatory award is removed for successful automatic unfair dismissal claims for making protected disclosures, the compensatory award as assessed above, is not affected by the statutory cap in any event.
33. The claimant claims a 10% uplift in compensation for the respondent's failure to follow the ACAS Code of Practice. The Tribunal can make an uplift of up to 25% pursuant to section 207A Trade Union & Labour Relations (Consolidation) Act 1992 (TULR(C)A). The uplift applies to complaints listed in Schedule A2 of TULR(C)A. These include discrimination, unfair dismissal and unlawful deductions from wages complaints. However, the claimant relies upon the respondent's alleged failure to engage with ACAS early conciliation. I am satisfied that there was no breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures in this case and therefore, no uplift is awarded.
34. Finally, I considered whether there should be any reductions to the compensatory award on grounds of contributory conduct by the claimant or on Polkey principles.

35. As far as reductions under section 123(6) ERA are concerned, for the reasons set out above, I am not satisfied that there was sufficient evidence that the claimant contributed to her dismissal so that it is just and equitable to reduce the compensatory award. Additionally, I do not accept that the claimant's failure to attend the disciplinary hearings contributed to her dismissal such that it is just and equitable to reduce compensation. Therefore, no reduction is made.
36. Under Polkey principles, the respondent also sought reductions on the basis that the claimant would have been dismissed in any event had a fair procedure been followed. Therefore, a 100% reduction was sought. I do not accept that to be the case. The respondent contends that there was clear evidence of racist behaviour within the documents I was referred to, but I am not satisfied that is the case. The minutes of the investigation hearing and the minutes of the appeal hearing do not show that the claimant would have been dismissed in any event. Therefore, I make no reductions on Polkey principles.

Compensation for race discrimination

37. The claim for discrimination relates to the failure to provide an independent and impartial Polish interpreter, namely someone who did not work for the respondent. The claimant referred to this as "*language discrimination*". It was clear from the documentation provided by the claimant in her ET1 claim form that at the investigation stage and the appeal stage, two of the respondent's employees interpreted for the claimant. The claimant does not accept the accuracy of their interpretations. In order to award injury to feelings, I have to consider what injury to feelings resulted from the failure by the respondent to appoint an independent Polish interpreter. There was no evidence that the respondent's failure to appoint an independent Polish interpreter resulted in the injury to feelings suffered by the

claimant. The evidence provided by the claimant's niece and the multiple witness statements to which I have had regard, all provide that the injury to feelings was caused by the allegations that the claimant had been racist and her dismissal.

38. The injury to feelings was in respect of the allegations of racism levelled against the claimant and the effect of her dismissal. There was no claim that the dismissal was of itself an act of race discrimination. Therefore, I award no injury to feelings under section 124 EQA 2010.

Employment Judge Welch
Date: 29 August 2024

JUDGMENT SENT TO THE PARTIES ON

.....06 September 2024.....

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FOR THE TRIBUNAL OFFICE

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