CASE NUMBER: 2300228/2021

EMPLOYMENT TRIBUNALS

Claimant: **Miss H Salih**

Respondent: **Mytime Active**

Heard at Ashford **On: 18 April 2024**

Before: **Employment Judge Corrigan**
Mr S Corkerton
Mr S Huggins

Representation
Claimant: In person
Respondent: Ms S Ismail, Counsel

REASONS

For Judgment on remedy sent to the parties on 16 September 2024
Reasons sent at the claimant's request

1. The breakdown of the loss of earnings awarded was given in detail in the judgment, along with the fact that account had to be made of the redundancy pay the claimant had already received. The parties were sent a covering letter explaining that the figures discussed at the hearing had been modified to reflect a 3 % pay rise at the respondent.
2. These reasons therefore focus on the other decisions made at the remedy hearing in the areas of dispute between the parties or otherwise for example in respect of the rate of pay used to calculate the loss of earnings, the issue of whether the claimant reasonably mitigated her loss and why there was a reduction of 40 % to reflect the chance the claimant would have been dismissed in any event. They should be read in conjunction with the liability reasons.
3. The claimant gave evidence at the remedy hearing and both sides had the opportunity to make representations.

Was there a chance that the claimant might have been fairly dismissed in any event?

4. We had already addressed this question in part in paragraphs 109-114 of the liability decision.

5. We noted that the implication of our liability decision is that a fair process might not have led to the same structure and exactly the same alternative role going forwards as the respondent in fact adopted.
6. Taking account of our findings in paragraphs 109 and 110 we considered there was a 50:50 chance the claimant would have been offered a trial period in the HR Advisor role or whatever similar role was in the final structure.

7. Turning to whether or not the claimant would have applied for the role if she did not get a trial. We had already found there was a possibility that the claimant would still not have applied given the comments on salary level and career path. However having heard the claimant further we find it likely that she would have applied to the closest fitting alternative role and the closest role in terms of pay if she had had confidence in the process.

8. We also find it likely she would, had she applied, have had the opportunity to show the respondent her potential. Had she had that opportunity we find it very likely she would have remained in employment in a similar level role, as Ms Mason would have seen her value to the organisation and to the HR team in particular. The claimant has the potential to succeed in many aspects of the role and to acquire the employment law knowledge needed, but there were also other ways that could have been achieved such as through the use of other resources. For example the use of a law consultant that she had used before. We are persuaded by her experience within the organisation of having moved roles 6 times and each time proving her worth, including most recently becoming the specialist HR role dealing with apprenticeships. She has also done it again in the different role she has had since leaving the respondent. We note the claimant's particular strength in working with managers in the practical application of policy. Nevertheless we had however already found there remained a possibility that she would not have been successful as she did not have the wider HR experience already.

9. We found overall taking into account all of the possibilities there was a 60% chance of the claimant remaining in employment if a fair process had been followed, and that there should be a 40% reduction to reflect the possibility that she would not.

What rate of pay would the claimant have had if she had remained in employment?

10. We find it likely there would have been a salary drop if the claimant had remained in an alternative role, but in a fair process there would have been some leeway shown in the same way as was shown to others, and that in the end has been reflected in the salary to which the respondent ultimately recruited. We find the salary would have been £29,000.

11. However the claimant would still have been entitled to the uplifts which were only agreed a year before – which would have taken her salary to £31,900 and 23% pension. The Uplifts that the claimant received were separate from her salary range and were compensation for loss of public sector pension and benefits.

12. The claimant would have accepted that, albeit reluctantly. We take into account the length of time she spent at the respondent and it's high value to her life and also the value in the uplift both of salary and pension. We note that it is still more than she has been paid in her current position atleast until April 2023.

13. The claimant's losses have therefore been calculated on the basis of a salary of £31,900 and pension contributions of 23%.

Did the claimant reasonably mitigate her loss?

14. The claimant very quickly got alternative employment through an agency. This was reasonable mitigation. She has found that work very fulfilling so when the opportunity arose to work direct with the London Borough of Bromley again she applied and was successful. At this point she did not realise the implications of abatement. We considered this was reasonable mitigation.

15. Then the claimant in around May 2022 found out that she had been overpaid because abatement did apply. She was then supported by London Borough of Bromley to take steps to minimise the impact by splitting her role into a 26 hour contract and working the rest via the agency. It's not our role to comment on the legitimacy of that arrangement but accept it was steps taken to mitigate her loss.

16. This problem would apply throughout the public sector. The respondent has accepted the claimant's skills are more suited to the public sector and we do not consider that it was a failure to reasonably mitigate that the claimant did not at this point look again at the private sector. She had reasonably mitigated. She found alternative employment very quickly that she is settled in and enjoys. We take into account that she would have been about 60 at this point and was not looking for a further career change. Overall we consider she has reasonably mitigated her loss.

17. We awarded the abatement sum that the claimant had to pay once she became aware of it and pension loss until 6 September 2021. We did not award any other pension loss because by then the claimant was back in what is likely a better scheme and once she became aware of the impact of abatement she has now chosen a way to mitigate her abatement costs. That is a choice she has made and we do not consider the respondent liable for it. She does have the option to seek employment in which abatement would not apply and has chosen not to.

18. Ultimately the claimant had fully mitigated her loss of earnings after 1 April 2023. Had she not, we considered it would in any event have been fair to end the loss from today. The reasons for this are the length of time since the dismissal, the fact the claimant has reasonably mitigated her loss and is happy in her new role. She has her statutory rights again and is in a better

pension scheme once again. She's chosen the working arrangement which suits her.

_____
Employment Judge Corrigan
Date: 26 September 2024

Sent to the parties on
Date: 27 September 2024