



THE EMPLOYMENT TRIBUNALS

Claimant: Ms L Embleton

Respondent: Evans of Newcastle

Heard at: North Shields Hearing Centre **On:** Wednesday 22nd May 2019

Before: Employment Judge Martin

Claimant: In Person
Respondent: Mr McCall, Proprietor

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is well-founded. The claimant is awarded compensation in the sum of £6333.83.

REASONS

Introduction

The Tribunal was provided with two bundles of documents: one from the claimant and one from the respondent which were incorporated into one bundle of documents marked appendix 1. The claimant gave evidence on her own behalf. Mr McCall gave evidence on behalf of the respondent.

The law

The Tribunal considered the following legislation and case law:

Section 98(1) Employment Rights Act 1996 "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."

Section 98(2) Employment Rights Act 1996 "A reason falls within this subsection if it:-

(a) Relates to the capability of employee for performing work of the kind which he/she was employed by the employer to do.

(c) is that the employee was redundant"

Section 98(4) Employment Rights Act 1996 "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."

Section 139(1) Employment Rights Act 1996 "an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-

(b) the fact that the requirements of that business:-

- (i) for employees to carry out work of a particular kind, or
- (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

Section 122(4) Employment Rights Act 1996 "the amount of the basic award shall be reduced or further reduced by the amount of:-

- (b) any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy (whether in pursuance of part XI or otherwise)"

Section 123(1) Employment Rights Act 1996 "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."

Section 123(4) Employment Rights Act 1996 "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."

Section 207(A)(2) of the Trade Union and Labour Relations (Consolidation) Actr 1992 "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 the relevant code of practice applies and an employer has failed to comply with that code, the employment tribunal may, if it considers it just and equitable in all the circumstances to increase any award it makes to the employee by no more than 25%”.

The case of *Williams & Others v Compair Maxam Limited 1982 IRLR* page 83 where the EAT held that in the case of redundancy the employer must take steps to warn and consult the employee about the potential redundancy adopt a fair criteria which should be fairly and properly applied and consider alternative employment.

The case of *Hardy v Polk (Leeds) Limited 2004 IRLR* page 420 where the EAT held that a compensatory award is based on compensating the victim of an unfair dismissal for his or her loss. It is not a penal award. There is the same duty to mitigate that loss so far as the employee is concerned, as there is a common law, which means that the employee must take reasonable steps to obtain alternative employment.

The case of *Gardiner – Hill v Roland Berger Technics Limited 1982 IRLR 498* where the EAT held that in a case where there is a failure to mitigate the Tribunal has to consider when, on a balance of probabilities, the employee would have obtained alternative employment at the same level.

The case of *Polkey v AE Dayton Services Limited 1987 IRLR* page 503 where the House of Lords held that, if a tribunal considers that an employee would have been dismissed if a fair procedure had been followed, the tribunal can reduce the amount of compensation by a percentage representing the chance that the employee would have been dismissed in the event that a fair procedure had been adopted..

The claims and issues

The Tribunal had to consider the reason for the claimant’s dismissal and whether it was a fair reason under section 98(2) of the Employment Rights Act, in particular whether it related to redundancy or the capability of the employee.

If the reason was, as stated, redundancy then the Tribunal had to consider whether there was a redundancy situation, namely whether the respondent required less employees to carry out work of the kind which the claimant undertook. If there was a redundancy situation, the Tribunal had to consider whether the claimant had been warned and consulted about the possible redundancy; whether there had been a fair selection criteria; whether any selection criteria had been fairly and properly applied; and whether the respondent had considered alternative employment.

If the reason for dismissal was capability the Tribunal had to consider whether the respondent believed that the claimant was incompetent; whether that was based on a reasonable belief; whether the claimant had been given the opportunity to improve and warned.

The Tribunal had to consider whether a fair procedure had been followed in relation to the dismissal and whether dismissal was a reasonable response in the circumstances of the case.

The Tribunal had to consider if it found that the claimant had been unfairly dismissed, what loss she had suffered as a result; what was the period of any loss taking account any sums already paid to her; whether the claimant had acted reasonably in mitigating any loss and if not when she might get alternative employment at a similar level.

The Tribunal also had to consider whether the claimant had contributed any way to her dismissal and whether she might have been fairly dismissed in any event and if so, for what reason, when and/or what was the percentage chance of that happening.

The Tribunal had to consider whether there should be an increase in any award for the failure to follow the ACAS code of conduct.

Findings of fact

The respondent is a small opticians based in Jesmond in Newcastle. Mr McCall is the sole proprietor and employs two part-time staff.

Mr McCall previously ran a number of opticians in the region, which he sold a few years earlier. He said that he had a pool of former staff, whom he would contact if he required assistance in his current business.

Mr McCall says that the way that he ran his business was in a collegiate style. He wanted to achieve a good working atmosphere.

The claimant was employed by the respondent in February 2015. Mr McCall says that he employed the claimant as an optical assistant. He said that he employed her because of her previous experience in working for an optical manufacturer and because she said that she would only need a refresher. The claimant however thought that she was employed as a receptionist. She said her previous experience was over 30 years ago. No contract of employment was issued to the claimant.

The claimant was employed to work sixteen hours a week on Wednesdays and Fridays but was also required to cover holidays and absences.

Mr McCall usually worked four days a week:- normally Monday, Tuesday, Thursday and Saturday. He worked alongside Nicola Muirhead, who had worked in the business for a number of years as an optical assistant.

Mr McCall said in evidence that about a year after the claimant commenced employment there began to be problems with her ability in relation to her role as an optical assistant. In evidence he said that he worked with her about ten or twelve times a year and had to correct her work all the time. However, when he was cross examined he admitted he probably only worked with the claimant 10 – 15 times during the whole of her employment.

The claimant says that she only worked with Mr McCall when she had to cover Nicola's holiday. She says that the first time she did that was in 2015 when Mr McCall told her to leave the more complex order forms to Nicola. Mr McCall said that he did that because he did not think the claimant was able to grasp the more simple tasks. The claimant said that she did not then work for Mr McCall very often to cover holidays and usually Susan a former employee of Mr McCall worked either with the claimant or covered Nicola's holidays/absence. The claimant said that Susan told her that she had been brought in because the claimant wasn't confident.

Mr McCall said that he normally tried to bring Susan in to cover because he didn't think the claimant was confident. He said and that he would often try avoid working with the claimant because of the mistakes he said she was making.

The claimant said that it was Susan that made a mistake in 2016, but she did not correct Mr McCall who thought it was her mistake.

The claimant says that she wasn't given any training on how to do certain orders. She said that she did not make mistakes and could do the job which she was employed to do. She said that she was not able to do the more complex order forms because she had never been given any training to do them. She said she asked Mr McCall to check that she had got it right. Mr McCall said that he had to correct her work and often brought Susan in instead to assist

The claimant says that she didn't work with Mr McCall very much after and only for a few days after Nicola's holiday in 2015.

Mr McCall was not able to give any details of any mistakes made by the claimant. The only specific example that he gave was set out in his letter of 23 December 20118 in response to the claimant's grievance letter regarding her dismissal. In that letter he indicates that she was unable to translate standard notation of RX into a single vision reading RX, which he says was a basic task and fundamental to the role. The claimant indicated that she was able to do this and that this was a simple task which was done on the computer.

Mr McCall also said that the claimant made mistakes when people came in for repairs to glasses or orders for glasses. The claimant said that she did not make mistakes in that regard. Again Mr McCall was not able to give any details of any errors the claimant had allegedly made. Mr McCall said that he did not raise those matters with the claimant because, although he says that he had to correct her mistakes, he says he did not want to make a big issue of it and he wanted to keep a good working atmosphere.

The claimant said that she rarely worked with Mr McCall and received no training and did not make anything other than occasional little mistakes. The only real error she says that she made was shortly before her employment was terminated by the respondent.

The claimant was not warned about the concerns around her capability, nor was Mr McCall able to provide any details of any specific issues which had been raised with the claimant, other than the issue in December shortly before her employment terminated.

It appears that shortly before her employment terminated the claimant did make an error in an order which she completed for RX Direct quoting a PD of 66 for each eye. The claimant admitted making this error, but she said that the order would not have been processed, because it was such an obvious error and that there would be no loss to the business.

At no stage during her employment was the claimant issued with any warnings, either formal or informal, regarding her capability.

The respondent said that the claimant made numerous basic errors, whereas the claimant said that she made none and had never been warned about any of her mistakes.

On 19th December 2019 Mr McCall invited the claimant to a meeting. He said it was “off the record” and told her that he was going to make her redundant and would pay her until January. The claimant was upset and left.

The claimant said that it was not an “off the record” chat. She says that she was told by Mr McCall that he had good and bad news. The bad news was that she was going to be redundant. The good news was that he was going to pay her until January. She said that she was called into this meeting at 5.15 the Friday before Christmas.

The claimant raised a grievance with the respondent about her redundancy on 20th December. She complained about being made redundant. She also raised concerns that she was being replaced by another employee. She said that there was no issues regarding her performance and that she had been issued with no warnings. The letter is at page 1 of the bundle. Mr McCall replied to that letter on 23 December 2018 stating that there were issues with the claimant’s capability. He referred to the last incident in December, indicating that he could have managed her out of the business in 4 weeks, but had made her redundant as a gesture of good will. That letter is at page 2 and 3 of the bundle.

Mr McCall admitted that Susan, who was a former employee at Mr McCall’s other business, took the claimant’s shift on 21st December, then worked through January 2019 and subsequently took on the claimant’s role and hours.

The claimant was paid until January 2019, but the claimant was not paid any notice pay until she contacted ACAS. Her notice pay and a redundancy payment was then made.

The claimant said that she was very upset after she was dismissed. She was signed off sick by her doctor suffering from depression. She acknowledged that she had some personal issues, but her dismissal was the final straw for her..

The claimant was signed off sick from 19th December through to 31st January and thereafter for a further two weeks from 4th February to the 18th February (pages 5 to 7 of the bundle). She has since been referred for counselling for her depression. She is awaiting an appointment with Talking Therapies.

On 31st January the respondent wrote a reference for the claimant. In the reference Mr McCall described her as a receptionist and gave her a good reference.

Since her dismissal the claimant was unsure how many jobs she had applied for. She thought it was about 5. She is looking for part-time work of about sixteen hours a week and is looking for admin; receptionist work; or care work. The claimant said that she had one interview, but did not get the job. She could not produce copies of any jobs for which she has applied. She was unclear as to for how long she was seeking compensation. She said that it was until she could get another job, but could not give any indication of when she thought she would get another job.

The claimant was earning £554.67 a month with the respondent.

Submissions

The claimant submitted that her dismissal was unfair. She said there was no redundancy situation because she had been replaced by another employee.

The respondent submitted that he told the claimant that she was being made redundant, although she was really being dismissed because of her capability.

Conclusions

1. The claimant was purportedly dismissed for redundancy. However, the respondent still required the same number of people to undertake the same work which the claimant did. Thus there was no redundancy situation.
2. Accordingly, although redundancy is a fair reason for dismissal under section 98(2) of the Employment Rights Act 1996, it could not be the reason for dismissal in this case.
3. In any event, the respondent did not follow any procedure when they purportedly tried to dismiss the claimant for redundancy. She was called into a meeting without any warning and effectively told that her role was redundant, even though the respondent was intending to and did in fact replace her immediately thereafter.
4. Accordingly for those reasons her dismissal is unfair.
5. The Tribunal does not consider that the claimant contributed in any way to her dismissal.
6. The Tribunal considered whether the claimant might have been fairly dismissed in any event. In this case, the Tribunal considered whether she might have been dismissed for capability, however there was not sufficient evidence that the respondent had any basis for dismissing the claimant for capability. They had not given her any formal or informal warnings about her capability. Indeed during his evidence, Mr McCall was unable to give details of any specific issues with the claimant, other than one issue to which the claimant admitted, which occurred just before her dismissal. Furthermore during cross examination it was unclear how much Mr McCall actually worked with the claimant and could therefore comment on her work. Finally the Tribunal has noted that the reference given by Mr McCall does not suggest that there were any issues with the claimant's capability.

7. Accordingly the tribunal does not consider, based on the evidence placed before it, that there is any basis for a reduction in the claimant's award to reflect the fact that she might have been fairly dismissed for capability if a fair procedure had been adopted.
8. The Tribunal does not consider that the claimant has acted reasonably in mitigating her loss. It has noted that she has effectively only applied for one job a month in the last five months. The Tribunal does not consider that amounts to a reasonable attempt to properly mitigate her loss. In that regard, the tribunal has taken into account that she has been signed off sick, but noted that she is still looking for work. The Tribunal has also noted that the claimant has been referred for counselling for her depression and will therefore be able to properly mitigate her loss in due course.
9. The Tribunal took into account that the claimant is looking for part-time work in various sectors where there should be posts available. The Tribunal considered that, if the claimant had properly tried to mitigate her loss, she should have been able to obtain a new job within a few months. However, the Tribunal has taken into account the claimant's illness and considers that, after she has had the opportunity to attend counselling and properly look for work, she ought to be able to obtain new employment within six months from the date of this Hearing.
10. The Tribunal then went on to find that the respondent had failed to follow the ACAS code of conduct. The claimant is accordingly awarded an uplift on her award of 10% for the failure to follow that code. The Tribunal has noted that the respondent is a small employer, however Mr McCall has been in business before. Further in this case there was a complete failure to follow the code.
11. Accordingly the claimant is awarded compensation for unfair dismissal in the sum of £6,333.83 calculated as follows:-

Basic award	Nil (The claimant had received a redundancy payment from the respondent).
Compensatory award Immediate	
1 Feb-22 May (taking account of notice pay paid) – 3 months 3 weeks at £554.67	£2,080.01
Future loss 22 nd May – 21 st November - six months at £554.67	£3,328.02

Loss of statutory rights	£350.00
Sub Total:	£5758.03
Add uplift of 10% for failure to follow ACAS code of conduct	£575.80
Total compensatory award	£6333.83

EMPLOYMENT JUDGE MARTIN

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 13 June 2019**

Public access to employment tribunal decisions

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NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2503597/2018**

Name of case(s): **Ms L Embleton** v **Evans of Jesmond**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **17 June 2019**

"the calculation day" is: **18 June 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.