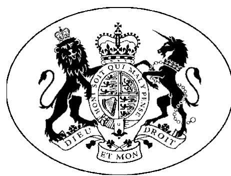

EMPLOYMENT TRIBUNALS

Claimant: **Ms. A Harpham**

Respondent: **Mansfield Community and Voluntary Service**

Heard at: **Nottingham** **On:** **Monday, 28th January 2019**

Before: **Employment Judge Heap**

Members: **Mr A O'Dwyer**
Mr J D Hill

Representatives

Claimant: **In Person**
Respondent: **Mr. A Tinnion - Counsel**

JUDGMENT

1. Compensation is the appropriate Order to make and the Respondent is Ordered to pay to the Claimant the sum of **£28,406.04** as compensation for unfair dismissal.

2. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply to this award.

REASONS

BACKGROUND & THE ISSUES

1. This Remedy hearing followed on from an earlier Reserved Judgment in which we found in favour of the Claimant in relation to a complaint of ordinary unfair dismissal. The matter thereafter came before us today for the purposes of that Remedy hearing. We have explained to the Claimant the Orders that the Tribunal is able to make in respect of a well founded claim of unfair dismissal and that they are namely Orders for reinstatement, re-engagement or compensation. The Claimant has made it clear that she seeks an order for compensation only. Given the circumstances that is not an unusual position and it is not one which we find difficult to understand. It is accordingly the Order that we deem it appropriate to make.

2. We have heard evidence from the Claimant today in relation to her financial losses flowing from her dismissal. We have also heard submissions both from the

Claimant and from Mr. Tinnion, who again appeared on behalf of the Respondent, before making our determination of the remaining issues before us.

THE LAW

3. Remedies for unfair dismissal are provided for by Sections 118 to 126 Employment Rights Act 1996. The provisions relevant to this claim are contained within Sections 123 and 124 Employment Rights Act 1996 which provide as follows:

Section 123 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.

(3)The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

(a)any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or

(b)any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same 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.

(5)In determining, for the purposes of subsection (1), how far any loss sustained by the complainant was attributable to action taken by the employer, no account shall be taken of any pressure which by—

(a)calling, organising, procuring or financing a strike or other industrial action, or

(b)threatening to do so,

was exercised on the employer to dismiss the employee; and that question shall be determined as if no such pressure had been exercised.

(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.

(6A)Where—

(a)the reason (or principal reason) for the dismissal is that the complainant made a protected disclosure, and

(b)it appears to the tribunal that the disclosure was not made in good faith,

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

(7)If the amount of 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) exceeds the amount of the basic award which would be payable but for section 122(4), that excess goes to reduce the amount of the compensatory award.

(8)Where the amount of the compensatory award falls to be calculated for the purposes of an award under section 117(3)(a), there shall be deducted from the compensatory award any award made under section 112(5) at the time of the order under section 113.

124 Limit of compensatory award etc.

(1)The amount of—

(a)any compensation awarded to a person under section 117(1) and (2), or

(b)a compensatory award to a person calculated in accordance with section 123,

shall not exceed the amount specified in subsection (1ZA).

(1ZA)The amount specified in this subsection is the lower of—

(a) £83,682, and

(b)52 multiplied by a week's pay of the person concerned.

(1A)Subsection (1) shall not apply to compensation awarded, or a compensatory award made, to a person in a case where he is regarded as unfairly dismissed by virtue of section 100, 103A, 105(3) or 105(6A).

(2). . . . .

(3)In the case of compensation awarded to a person under section 117(1) and (2), the limit imposed by this section may be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(4)Where—

(a)a compensatory award is an award under paragraph (a) of subsection (3) of section 117, and

(b)an additional award falls to be made under paragraph (b) of that subsection,

the limit imposed by this section on the compensatory award may be exceeded to the extent necessary to enable the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under section 114(2)(a) or section 115(2)(d).

(5)The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—

(a)any payment made by the respondent to the complainant in respect of that matter, and

(b)any reduction in the amount of the award required by any enactment or rule of law.

FINDINGS OF FACT

4. Based upon the evidence that we have seen and heard we make the findings of fact set out below.

5. The Claimant was made redundant by the Respondent with effect from 20th October 2016. That was following a period of garden leave when she was not required to work but remained in the employment of the Respondent and was paid at her normal rate of pay. The Claimant's gross monthly earnings as at that date were in the sum of £2,367.17 per month (see page 160 of the hearing bundle) equating to a gross annual salary of £28,406.04. Her net monthly earnings were in the sum of £1,854.42 equating to a net weekly pay of £427.94.

6. The Claimant was unemployed between 20th October 2016 and 2nd January 2017. She did not claim any unemployment benefits during that period and her evidence was that that was a personal choice. We accept, however, that the Claimant was actively seeking work via internet searches and having registered with agencies at this and during her other periods of unemployment. to which we shall come in due course. She essentially focused her efforts on finding alternative employment rather than by way of seeking to claim unemployment or other benefits.

7. The Claimant ultimately gained employment as an Assistant Quantity Surveyor with a small and relatively newly formed company by the name of RH Consulting Limited. That period of employment lasted for 8 weeks between 3rd January 2017 and 28th February 2017. Although the Claimant's title was Assistant Quantity Surveyor, we understand her position to have been as an Assistant to the Managing Director and largely comprised of administrative duties. During that period of employment the Claimant earned the sum of £2,795.02 net. The Claimant lost that position through no fault of her own as a result of what appears to be a downturn in work (see page 169 of the hearing bundle).

8. The Claimant was again then unemployed for a period of 19 weeks between 1st March 2017 to 11th July 2018. Thereafter she secured temporary employment as a temporary agency worker with the GI Group and was placed with one of their clients, Wilkinsons, working at their premises. We accept the Claimant's evidence that that was originally intended to be a 2 to 3 week placement in the Human Resources department of Wilkinsons providing cover. However, on the day that that assignment was due end the Claimant was asked to stay on working within the Finance Department as a result of sickness and other absences affecting that particular team. That extension of contract continued until 28th April 2018 – equating overall to a period of 41 weeks and 2 days.

9. The Claimant was then unemployed again over a period of 16 weeks between 29th April 2018 and 19th August 2018. Thereafter, the Claimant secured employment with Derbyshire County Council as a Benefit Support Worker. Although initially due to expire in March 2019, that contract has now been extended with the Claimant hoping it will lead to a permanent Officer role in due course. The Claimant has been in that role currently for a period of 23 weeks as at the date of this hearing, earning £1,322.24 net per month or £305.13 net per week.

<u>THE CLAIMANT'S POSITION</u>

10. We turn then to the competing arguments which we have heard from both parties during the course of the hearing.

11. The Claimant argues that the Respondent should be Ordered to pay her full losses flowing from her unfair dismissal and as set out in her latest Schedule of Loss which appears at pages 157 to 159 of the hearing bundle.

<u>THE RESPONDENT'S POSITION</u>

12. The Respondent's position is that the Claimant should have significant reductions or adjustments made to the losses that she seeks to claim and which are set out in her most recent Schedule of Loss. There are a number of arguments advanced in that regard and we deal with each separately below.

13. The first of those arguments is that by virtue of **<u>Polkey</u>**[1]. The Respondent says that firstly it is far from certain that the Claimant would have obtained the alternative role in the restructure for which she applied and a reduction of somewhere in the region of 50% should be made to take that into account. We have considered that carefully but we do not agree. Our findings, particularly at paragraphs 288 and 289 of the liability judgment, are at odds with that contention. This was not a situation where the Claimant would have been pitched against Lesley Watkins but one where she would have been slotted into the post and Ms. Watkins given the voluntary redundancy that she sought. There was no possibility, on the basis of those facts as we found them to be, that the Claimant would have been made redundant because the need for applications for that post would have fallen away. Whilst Mr. Tinnion seeks to argue that we were wrong in both our findings and conclusions in that regard, the Respondent has not sought to challenge either by way of appeal to the Employment Appeal Tribunal nor any application for Reconsideration. It is not now open to Mr. Tinnion in the context of this Remedy hearing to say that we should reach conclusions which are at odds with those that we made in the liability Judgment.

14. We are satisfied both now and at the time of the liability Judgment that if the

[1] **Polkey v A E Dayton Services** Limited CA ([1987] 1 All ER 984

Respondent had acted reasonably the Claimant would have been slotted into the vacant post and Ms. Watkins given the voluntary redundancy that she wanted. In those circumstances on the facts found it is in our view inevitable that the Claimant would have retained a role with the Respondent in the new structure and, as we also found within those particular paragraphs of the liability Judgment, she would have taken it. Therefore, there is no basis upon which to make a reduction in the compensatory award in respect of **Polkey** considerations.

15. Secondly, the Respondent argues says that the chain of causation was broken in respect of the Claimant's losses after she gained employment firstly with RH Consulting or, alternatively, when she took up employment with the GI Group or, again alternatively and finally, when she took up her current post with Derbyshire County Council. We take each of those in turn.

16. In reaching our determination on these matters we have had regard to the Employment Appeal Tribunal authorities of **Commercial Motors (Wales) Ltd v Howley [2012] UKEAT 0636 – 11 – 0608** and **Cowen v Rentokil Initial Facility Services (UK) Ltd UKEAT/0473/07/DA** (and particularly paragraphs 48 to 55 of the latter) and also to the conclusions reached in **Dench v Flynn & Partners [1998] I.R.L.R. 653**, the facts of which are not entirely dissimilar from the case before us. We were also referred by Mr. Tinnion to the decision of His Honour Judge Serota QC in **Osei-Adjei v RM Education Ltd UKEAT/0461/12/JOJ** although that had minimal application to the facts of this case.

17. We have in mind particularly the following observations of Beldam LJ in Dench:

"No doubt in many cases a loss consequent upon unfair dismissal will cease when an applicant gets employment of a permanent nature at an equivalent or higher level of salary or wage than the employee enjoyed when dismissed. But to regard such an event as always and in all cases putting an end to the attribution of the loss to the termination of employment, cannot lead in some cases to an award which is just and equitable.

Although causation is primarily a question of fact, the principle to be applied in deciding whether the connection between a cause, such as unfair dismissal, and its consequences is sufficient to found a legal claim to loss or damage, is a question of law. The question for the Industrial Tribunal was whether the unfair dismissal, could be regarded as a continuing course of loss she was subsequently dismissed by her new employer with no right to compensation after a month or two in her new employment. To treat the consequences of unfair dismissal as ceasing automatically when other employment supervenes, is to treat as the effective cause that which is simply closest in time.

Causes, in my view, are not simply beads on a string or links in a chain, but, as was said many years ago, they are influences or forces which may combine to bring about a result. A tribunal of fact has to consider the appropriate effect of the wrongful or unfair dismissal and the effect of the termination of any employment which is subsequently obtained. That is a function which an Industrial Tribunal is called upon frequently to perform and, provided it does not regard itself as rigidly bound in every case to take the view that a subsequent employment will terminate the period of loss, it seems to me that it will be able, fairly and equitably, to attribute to the unfair dismissal the loss which has been sustained."

18. We are satisfied having regard to those authorities and the evidence before us that the Claimant's employment with RH Consulting did not break the chain of causation to the loss which the Claimant has sustained and that her ongoing losses in fact did, on the circumstances of the case, remain attributable to the original dismissal. In this regard we take into account the following:-

    (a) The fact that the role was very different to that which the Claimant had previously undertaken and was at a lower rate of pay;

    (b) The fact that the company was a small and relatively newly formed entity, leading to some lack of stability for possible long term employment prospects;

    (c) That although the role was "permanent" on the face of it, it transpired as a result of events outside the Claimant's control to be temporary in nature;

    (d) The duration of the role was very short; and

    (e) The reason for it coming to an end was a supervening event outside the Claimant's control. There was no issue of misconduct or resignation at play.

19. The role with RH Consulting was not, for all those combined reasons, permanent employment when examined closely and having regard to all the facts. Given the nature of the newly formed entity it was always somewhat precarious. It was a very different role from that which the Claimant had performed and an entirely supervening event not of the Claimants making rendered the position to be of extremely short duration. We are satisfied that the taking of the RH Consulting position for what transpired to be a short period of time does not result in the losses flowing from the period after the termination of that employment to not still be causally linked to the unfair dismissal by the Respondent.

20. Therefore, we find there was no break in the chain of causation in respect of those matters and the Claimant is entitled to ongoing losses flowing from the original dismissal after her employment with RH Consulting terminated.

21. Turning then to the GI Group role that was not, as Mr. Tinnion appeared to suggest, permanent employment as an employee. It was a position as an agency worker as is abundantly clear from the Claimant's evidence and the documentation within the hearing bundle describing her as a temporary worker. Whilst the Claimant stayed longer than anticipated initially, the role with Wilkinsons for which she was engaged by the GI Group was clearly only ever temporary. No other work was offered by the GI Group to the Claimant after that assignment ended. To suggest that obtaining what was clearly only ever temporary agency work would break the chain of causation would be to defeat the principle of requiring Claimants to mitigate their losses as it would clearly deter them from accepting anything other than better paid permanent employment. We do not therefore accept the GI Group temporary assignment broke the chain of causation and again the Claimant is entitled to recover her ongoing losses after that assignment came to an end.

22. This finally leaves the role with Derbyshire County Council. We accept that this is permanent employment but it remains at a lower salary and the Claimant is entitled to be compensated for her reasonable ongoing losses to the date of this hearing as she claims. Again, to suggest otherwise would defeat the requirement to mitigate loss as the Claimant would be less willing to accept anything other than better paid alternative employment.

23. The third argument so as to reduce compensation raised by Mr. Tinnion on behalf of the Respondent is to contend that the Claimant has failed to mitigate her losses. Mr. Tinnion argues that the Claimant could have obtained a suitable post much more swiftly and did not take all necessary steps to mitigate or, alternatively, that she should have continued to look for and secure better paid employment after taking up her present role with Derbyshire County Council.

24. However, the burden to show that the Claimant has failed to apply for some suitable post or other falls on the Respondent and they have adduced nothing in that regard. There are, for example, no job advertisements or similar which Mr. Tinnion is able to take us to in order to demonstrate that the Claimant failed to apply for suitable positions. The Respondent has therefore not discharged the burden of showing that the Claimant has failed to mitigate her losses and we can accordingly deal with that in very short order and conclude that we shall make no reduction in respect of such matters. In all events, we would observe that we accept that the Claimant had been looking at all material times for other suitable jobs – including at lower rates of pay to that which she had enjoyed with the Respondent - and that she now sees the role with Derbyshire County Council as a future career path. As such, it is not unreasonable for her to wish to retain that particular post given the potential for stability rather than be looking for a better paid role elsewhere.

25. Finally, the Respondent argues that the Claimant should face a reduction in compensation by reason of the fact that she had not claimed unemployment benefits during the period before she gained employment with RH Consulting, after she lost that role and after her assignment with Wilkinsons (via the GI Group) ended.

26. The Respondent is critical in this regard of the fact that the Claimant did not claim unemployment benefits during the course of the three periods of unemployment to which we have already referred and says that some reduction to compensation should be made for that. We do not agree after carefully considering that point and the Respondent's position. Firstly, it is difficult to criticise the Claimant for placing her efforts into seeking paid employment rather than a reliance on state benefits. We do not consider it would be just to reduce her compensation to take account of the value of benefits that she did not ultimately claim.

27. Secondly the Respondent is in no different position by this contended failure to mitigate loss. Assuming that the Claimant had claimed state benefits, the sums Ordered to be paid by the Respondent would be the exact same, save as for the fact that the Respondent would be paying any benefits claimed back to the appropriate agency rather than to the Claimant directly. The overall sum that we would have Ordered to have been paid would therefore not be any different. Finally, the Respondent has not provided any authority to support its position on this issue, less still any evidence that had the Claimant claimed benefits that would in some way have reduced their liability for the sums which she now claims.

CONCLUSIONS

28. The Claimant accepts that she has been paid a statutory redundancy payment by the Respondent and is therefore not entitled to a basic award. She is, however, entitled to a compensatory award. As we have already observed above, we do not consider it just and equitable to make any reduction to those losses, either by virtue of the matters raised by the Respondent (with which we have dealt above) or at all.

29. It follows that the Claimant is entitled to recover her losses as follows:-

- Unemployment period number one from 20th October 2016 to 2nd January 2017, which is a period of 10 weeks and 4 days equating to a net loss of £4,523.94.

- Ongoing losses during employment with RH Consulting given that the Claimant was employed on a lower rate of pay. The Claimant would have received from the Respondent during this period the sum of £3,423.52 net but received from RH Consulting the sum of £2,795.02 which is to be offset. That equates to a net loss of £628.50.

- Unemployment period number two from 1st March to 11th July 2017, which is a period of 19 weeks equating to a net loss of £8,130.86.

- Ongoing losses during a period of temporary assignment with GI Group over 41 weeks and 2 days. The Claimant would have received from the Respondent the sum of £17,667.80 during that period. She received from GI Group the sum of £7,701.85 which are offset. That leaves a net loss of £9,965.95.

- Period of unemployment number three totalling 16 weeks at £427.94 per week and equating to a net loss of £6,847.04.

- Ongoing losses to date with Derbyshire County Council over a period of 23 weeks to the date of hearing. The Claimant would have received from the Respondent during that period the sum of £9,842.62. She has received from Derbyshire County Council the sum of £7,017.99 which it to be offset and which equates to an additional net loss to date of £2,824.63

30. We add to those sums a loss of pension contributions of £3,709.31 which the Respondent does not dispute and the sum of £350.00 which we consider to be just and equitable for the loss of statutory employment rights.

31. That equates to a global loss of £36,980.23, which we cap at 52 weeks gross pay in accordance with the provisions of Section 124(1)(z)(a) Employment Rights Act 1996 which applies to this particular case.

32. 52 weeks gross pay, as the figures at page 160 show, equates to the sum of £28,406.04 and that is the sum that we Order the Respondent to pay to the Claimant.

Employment Judge Heap

Date: 1st April 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE