

THE INDUSTRIAL TRIBUNALS

CASE REF: 2194/16

CLAIMANT: Roberta Young

RESPONDENTS: 1. John McKee Solicitors
2. Leonard Edgar

DECISION

The unanimous decision of the tribunal is that; the claimant suffered an unfair dismissal which was also automatically unfair; the claimant was not the victim of discrimination on the ground of age; and her claim for discrimination on the ground of age is dismissed. The tribunal awards the claimant compensation of £12,239.35 for her unfair dismissal.

Constitution of Tribunal:

Employment Judge: Employment Judge Greene

Members: Mrs M O'Kane
Mr I Foster

Appearances:

The claimant was represented by Mr W Young.

The respondents were represented by Mr B Mulqueen, of counsel, instructed by John McKee Solicitors.

SOURCES OF EVIDENCE

1. The tribunal heard evidence from the claimant and, on behalf of the respondents, from Leonard Edgar, Chris Ross, Shona Coulson and Gerard Small. The tribunal also received a bundle of documents comprising 160 pages approximately, witness statements and written submissions.

THE CLAIM AND DEFENCE

2. The claimant claimed that she had been discriminated against on the ground of age and that the respondents had unfairly dismissed her. The respondents disputed the claims in their entirety.

THE ISSUES

3. Legal Issues

- (1) Was the claimant's job redundant pursuant to Article 174 of the Employment Rights (Northern Ireland) Order 1996?
- (2) Was the claimant unfairly dismissed under Article 130 of the Employment Rights (Northern Ireland) Order 1996?
- (3) Did the respondents follow the LRA Code of Practice and Disciplinary and Grievance Procedures and/or the Statutory Disciplinary Procedures?
- (4) Did the claimant suffer discrimination under The Employment Equality (Age) Regulations (Northern Ireland) 2006?
- (5) Did the dismissal of the claimant amount to discrimination on the grounds of age? If yes, was such treatment a proportionate means of achieving a legitimate aim?
- (6) Was the claimant subjected to harassment on the grounds of her age?
- (7) Has the claimant presented any claim for age harassment in time? If not, is it just and equitable to extend time in all the circumstances?

Factual Issues

- (1) The claimant was born on 1 June 1962 and is 54 years old.
- (2) The claimant commenced employment with John McKee and Sons Solicitors on 24 November 2006. During her term at the firm she worked almost entirely for Gerard Small who is a partner in the firm?
- (3) On the morning of 22 August 2016 when the claimant commenced work she was informed that there would be 'pay offs' within the firm. At 10.30 am that morning she was dismissed from the firm.
- (4) Why was the claimant selected for redundancy and why were nine other secretaries not selected for redundancy? What selection process was used and what documentary evidence is there of any process being used?
- (5) If the reason for the dismissal was redundancy did the circumstances apply to all employees equally and especially those not selected for redundancy? If not was the redundancy automatically unfair?

- (6) Was Geraldine Cunningham compulsorily dismissed from the firm or did she take voluntary redundancy? Did Avril McCammon ask her to return to work on 16 January 2017?
- (7) The unsigned letter which the claimant was given at the time of dismissal was marked 'without prejudice' and 'subject to agreement'. Did this meet the requirements of a Notice of Dismissal and did it correctly outline the reason for dismissal?
- (8) Were the nine legal secretaries who did not face compulsory redundancy all younger than the claimant and if so does this amount to age discrimination?
- (9) Did the respondents speak to the claimant directly about why she was selected for redundancy and did they look at alternatives to redundancy? If not was this an unfair dismissal.
- (10) After dismissal, the claimant's routine work tasks were completed by other members of staff including those who were subject to dismissal. In September 2016, a paralegal was employed to work for Gerard Small. In January 2017, a new secretary was employed to work for Gerard Small. All of these persons are younger than the claimant and are doing the job the claimant would have been doing. Does this give rise to unfair dismissal and discrimination based on age?
- (11) Did the respondents undertake a reasonable search for alternative work through the firm in connection with the claimant? If not did this amount to unfair selection? Did the respondents offer other employees job sharing? reduction in hours, voluntary redundancy and, if so, did this make the claimant's dismissal unfair.
- (12) Did the respondents write to the claimant setting out the reasons for redundancy, meet with the employees to discuss the redundancy and hold an appeal of the dismissal? If not did they fail to follow the Statutory Disciplinary and Dismissal Procedures?
- (13) Did the claimant suffer harassment from Mr Edgar in the months leading up to dismissal? Was the harassment based on age? Was there a history of harassment of others in the firm by Mr Edgar and if so was Mr Edgar's conduct condoned by the firm?
- (14) What dismissal procedure was adopted by the first respondent prior to dismissing the claimant from employment?
- (15) When was the claimant dismissed from employment?
- (16) Who took the decision to dismiss the claimant from the employment?
- (17) What announcement was made by the respondents to the claimant and fellow employees on 22 August 2016?
- (18) Who was affected by this announcement?

- (19) What employees were dismissed from the first respondent organisation in or about September 2016?
 - (20) Why were these employees dismissed from employment?
 - (21) What age and what positions do each of these employees hold within the first respondent organisation?
 - (22) Did the second respondent stop speaking to the claimant from in or about May 2015? If yes, what was the reason?
 - (23) Did the claimant make any complaint or grievance about the purported conduct of the second respondent? If yes, when and to whom?
 - (24) Who currently undertakes the claimant's former duties and responsibilities?
 - (25) What efforts, if any, has the claimant made to seek alternative employment?
4. (1) After the hearing had begun the claimant withdrew her claims against the second respondent and accordingly the claims against him are dismissed. She also abandoned her claim of harassment on the ground of age and indirect discrimination on the ground of age.
- (2) At the start of the hearing the first respondent accepted that the claimant had been unfairly dismissed and that her dismissal was automatically unfair. It further conceded that an uplift of 20% should be made to the compensatory award.

FINDINGS OF FACT

5. (1) The claimant was born on 1 June 1962. She worked for the first respondent from 24 November 2006 until 22 August 2016 when she was dismissed.
- (2) The claimant worked as a legal secretary and earned, per week, £391 gross £326.78 net. The first respondent paid £50.00 per week towards her pension. The first respondent had about 22 support staff.
- (3) The claimant worked for 9 years as secretary to Gerard Small, a solicitor partner in the firm. She increased her educational qualifications during that time, and began doing some paralegal work. She completed 5 hours overtime per week for some three years before dismissal and in her twice yearly reviews her standard of work was commented on positively. She had experience in different areas of work including criminal law, litigation, conveyancing, corporate work, banking and debt recovery.
- (4) In August 2016 the first respondent's financial director advised the partners that the firm's viability was in danger due to excess staff resources and that staffing levels had to be significantly reduced with immediate effect. The financial director did not give evidence to the tribunal. Although the tribunal was not provided with any financial information that showed the viability of

the respondent business was at risk the claimant did not challenge the first respondent's witnesses on this issue.

- (5) The partners accepted the advice from their financial director and decided to reduce the workforce in agreed areas.
- (6) It was decided to reduce the team for whom Gerard Small was responsible by three people, one assistant-solicitor and two secretaries.
- (7) On 22 August 2016 staff were informed that there would be "pay-offs" within the firm.
- (8) Later on 22 August 2016 the claimant met with Leonard Edgar and Chris Ross, solicitor partners within the first respondent. She was given an unsigned letter entitled "Without Prejudice and Subject to Agreement" and informed that she was dismissed. She was not given a reason for her dismissal. The claimant was paid until 31 August 2016.
- (9) The letter contained details of a severance package being offered to the claimant. It included details of the claimant's statutory entitlements and an ex-gratia payment of £2997.28 which was stated to be in full and final settlement of all claims arising from the termination of her employment. The letter did not make any admission of liability and its terms were to remain confidential. Any reference for the claimant from the first respondent was subject to agreeing the terms. To give effect to the terms the claimant was required to sign a compromise agreement through the Labour Relations Agency.
- (10) The claimant received from the first respondent, on her dismissal, a redundancy payment of £5098.85 and nine weeks' notice pay, from 1 September 2016, amounting to £3371.94
- (11) The first respondent followed the same approach with the other staff members who were dismissed.
- (12) The respondent made 11 persons redundant in or about August/September 2016. The persons made redundant were solicitors Christopher Williams (date of birth 11 December 1989); Conor Kerr (date of birth 21 August 1982), Helen McCoubrey (date of birth 12 April 1960); Laura Connor (date of birth 3 December 1987); Stephen Martin (date of birth 26 November 1984); and support staff Patricia Bailie (date of birth 29 September 1965); Emily Gallagher (date of birth 4 January 1978); Clare Hughes (date of birth 30 June 1975); Frances Bradley (date of birth 3 January 1967); Geraldine Cunningham (date of birth 13 October 1963); and the claimant (date of birth 1 June 1962).
- (13) On 9 September 2016 the claimant attended a meeting with the Labour Relations Agency with other colleagues. The above terms of severance were reiterated. The claimant refused to sign the compromise agreement. Subsequent to lodging a claim with the industrial tribunals the claimant was informed, on 23 December 2016, that her position with the first respondent was redundant. The claimant disputes that her position was redundant.

However, in the course of her evidence to the tribunal when it was put to her that a redundancy situation obtained she replied "... if you say it happened then it happened".

- (14) Immediately after her dismissal other secretaries did her work and two paralegal persons were employed within two weeks, one of whom was assigned to Gerard Small. Shortly thereafter new secretaries were recruited. The first respondent also asked a secretary who had taken voluntary redundancy to return to work but she refused. The first respondent also asked a part-time and pregnant member of staff to work full-time.
- (15) The first respondent did not follow any procedure in making the claimant redundant nor were any steps taken with those to be made redundant to avoid or minimise the redundancies.
- (16) Nine secretaries were not dismissed and were not the subject of consideration for redundancy. There was not any evidence before the tribunal why or how they were not considered for redundancy. All were younger than the claimant. They were Heather Canning (date of birth 10 November 1972), Donna Kerrigan (date of birth 19 July 1969), Tania Edgar (date of birth 27 December 1975), Claire Elliott (date of birth 20 May 1988), Aurime Ribaciauskaite (date of birth 4 January 1992) Oorlagh Carville (date of birth 27 November 1980, Frances Nelson aged (date of birth 22 August 1981), Lisa Snooden (date of birth 16 April 1981) and Geraldine Cunningham (aged 52).
- (17) The claimant believes that one of the factors in the decision to dismiss her was her age. She further believed Leonard Edgar was determined to dismiss her and that he had overruled Gerard Small's objections to her dismissal.
- (18) Subsequent to her dismissal the claimant has become very withdrawn and has suffered from a severe loss of confidence.
- (19) The claimant continues to seek other employment. She has attended a jobs advisor every four weeks; reviews current job opportunities in the local newspapers; has placed her profile on the internet from which she receives emails about jobs that might be appropriate for her; registered with Energis Recruitment; has made a number of job applications and has had interviews. She has not yet been successful in securing employment. She has also, at her own expense, enrolled in a training course which would enable her to seek employment in the financial services sector.
- (20) Between August 2016 and 29 March 2018, evidence was given to the tribunal, that there were vacancies for 18 legal secretarial roles of which 5 were temporary. The positions seemed to cover the areas in which the claimant had experience.

THE LAW

6. (1) Where an employee is dismissed and the Statutory Dismissal Procedure is applicable but has not been completed and the non-completion is wholly or mainly attributable to the failure of the employer to comply with its

requirements, the dismissal is automatically unfair (Article 130A, The Employment Rights (Northern Ireland) Order 1996).

- (2) Where the circumstances set out at paragraph 6(1) above apply, a tribunal shall, increase any award to the employee by 10% and may, if it considers it just and equitable in all the circumstances, increase the award by up to 50%, unless there are exceptional circumstances which would make an increase unjust or inequitable. (Article 17(3) and (4) The Employment (Northern Ireland) Order 2003).
- (3) For the purposes of The Employment Rights (Northern Ireland) Order 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 the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him, or to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind, or 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 (Article 174(1) The Employment Rights (Northern Ireland) Order 1996).
- (4) A person (A) discriminates against another person (B) if on the ground of B's age, A treats B less favourably than he treats or would treat other persons. (The Employment Equality (Age) Regulations (Northern Ireland) 2006 Regulation 3(1)).
- (5) "... in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UK HL11, [2003] to all PR 25 [2003] IRLR 285, [2003] ICR 337** and suggests that it will often be appropriate to start by identifying the reason for the treatment the employee complains of. If the answer is that the reason is a protected characteristic, the finding of less favourable treatment will likely follow as a matter of inevitability." (Tolley's Employment Handbook 2018 32nd Edition at 12.15 at page 172).
- (6) An Industrial Tribunal shall not consider a complaint of age discrimination unless it is presented to the tribunal before the end of the period of three months beginning when the act complained of was done.
- (7) A tribunal may nevertheless consider any such complaint which is out-of-time, if, in all the circumstances of the case, it considers that it is just and equitable to do so (Regulation 48(4) The Employment Equality (Age) Regulations (Northern Ireland) 2006).

Application of the law and the findings of facts to the issues

- (1) The claimant has abandoned her claims against the second respondent and he is dismissed from these proceedings.
- (2) The claimant has also abandoned her claims of harassment on the ground of age and indirect discrimination on the ground of age, and these claims are also dismissed.

- (3) The respondent has acknowledged that the claimant was the victim of an unfair dismissal and that that unfair dismissal was automatically unfair. It further conceded that an uplift of 20% should be made to the compensatory award.
- (4) The claimant worked for the respondent from 24 November 2006 until 22 August 2016, when she was dismissed.
- (5) The reason given for the claimant's dismissal was that she had been made redundant. The first respondent maintains that the viability of the business was at stake. The claimant did not challenge that in evidence. There was not any evidence of the first respondent having taken any steps to minimise or avoid redundancies.
- (6) The tribunal accepts that the claimant had been made redundant. In so concluding the tribunal had regard to the following matters:-
 - (a) The tribunal was aware that there had not been any evidence before it of the financial difficulties faced by the first respondent business beyond the assertion by a number of witnesses that that was the situation.
 - (b) The claimant did not present to the tribunal, or discover or obtain from the first respondent, any information about the financial difficulties faced by the first respondent.
 - (c) The witnesses for the first respondent were not challenged in their evidence that there was not in truth a redundancy situation obtaining.
 - (d) The tribunal is also mindful of the effective acceptance of redundancy, as the reason for dismissal, by the claimant when she made the comment in the course of her cross-examination, "... if you say it happened, then it happened" in relation to the proposition that a redundancy situation obtained.
 - (e) The first respondent reduced its workforce by five solicitors and six secretaries which is consistent with the redundancy situation asserted by the first respondent and not consistent with the claimant's narrative that the first respondent was engaged in an exercise to get rid of older secretaries.
- (7) As the respondents have accepted that the claimant was the victim of unfair dismissal which amounted to an automatic unfair dismissal, there is no need to consider whether the respondents followed the LRA Code of Practice.
- (8) The tribunal is not persuaded that the claimant was the victim of discrimination under the Employment Equality (Age) Regulations (Northern Ireland) 2008. In so concluding the tribunal had regard to the following matters:-

- (a) The age range of the 6 secretaries dismissed, including the claimant, was from 38 to 54 and the age range of the nine secretaries retained was from 24 to 52.
- (b) Five secretaries dismissed were in their 40s and 50s. Four secretaries retained were in their 40s and 50s. One secretary dismissed was 38 and 4 secretaries retained were in their 20s and 30s.
- (c) Two secretaries dismissed were aged 38 and 41 whereas two secretaries retained were 43 and 47.
- (d) The thrust of the claimant's claim is that she, an older secretary, was made redundant while younger secretaries were not made redundant. Clearly many of the secretaries not made redundant were younger than the claimant. But all the secretaries made redundant were younger than the claimant.
- (e) The number and age range of those made redundant is similar to those not made redundant. So following the approach of the House of Lords in **Shamoon** the tribunal poses the question what is the reason for the treatment (dismissal) received by the claimant.
- (f) The claimant asserts the reason for her dismissal was her age. The first respondent says the reason was redundancy. The tribunal has already accepted that there was a redundancy situation obtaining for the reasons set out above.
- (g) Looking at the number and age range of the secretaries made redundant and those not made redundant and in particular that two secretaries dismissed were aged 38 and 41 whereas two secretaries retained were 43 and 47, the tribunal is not persuaded that age is the reason for the claimant's dismissal. The tribunal is fortified in that conclusion because the claimant did not dispute in the course of the hearing that she had been made redundant and there was not any persuasive challenge that a redundancy situation did not obtain within the first respondent business.
- (h) There was insufficient evidence before the tribunal to enable it to conclude that the appointment of a new secretary in January 2017 for Gerard Small or a paralegal in September 2016 were based on age.
- (9) The claimant has withdrawn her claim for harassment on the ground of age. In the light of the withdrawal of the harassment claim it is unnecessary to consider whether the claim was brought in time or not.
- (10) It is unnecessary for the tribunal to determine why other secretaries were not selected for redundancy in light of the respondents' acceptance that the claimant had been the victim of unfair dismissal and the tribunal's finding that she was not the victim of age discrimination. In any event the requisite evidence upon which any such finding could be made was not before the tribunal.

- (11) It is unnecessary for the tribunal to consider the redundancy procedure or its application to other members of staff.
- (12) The evidence before the tribunal was that Geraldine Cunningham accepted voluntary redundancy. There was not any evidence before the tribunal that Avril McCammon had asked to return to work. It is unnecessary for the tribunal to determine the effect of the unsigned letter entitled “without prejudice” and “subject to agreement” in light of the acceptance by the first respondent that it had unfairly dismissed the claimant.
- (13) In light of the acceptance of unfair dismissal and the dismissal of the age discrimination claim, it is unnecessary to determine whether the respondents spoke directly to the claimant about why she was made redundant.
- (14) It is unnecessary to consider factual issue 11 as the respondent has accepted unfair dismissal.
- (15) In relation to factual issue 12 it is no longer relevant as the respondents have accepted unfair dismissal and that the dismissal of the claimant was automatically unfair.
- (16) In relation to factual issue 13 the claimant has withdrawn her claim of harassment against the second respondent.
- (17) As the first respondent has accepted that it unfairly dismissed the claimant and that the dismissal was automatically unfair it is unnecessary for the tribunal to determine factual issues 14, 15, 16, 17 and 18.
- (18) In relation to factual issues 19, 20 and 21, 11 persons were dismissed by reason of redundancy.

The solicitors dismissed by the first respondent in or about August/September 2016 were Christopher Williams, Conor Kerr, Helen McCoubrey, Laura Connor, Stephen Martin. The secretaries dismissed were Patricia Bailie, Emily Gallagher, Clare Hughes, Frances Bradley, Geraldine Cunningham and the claimant.

The reason given for their dismissal was redundancy.

- (19) Christopher Williams was born on 11 December 1989, Conor Kerr on 21 August 1989, Helen McCoubrey on 12 April 1960, Laura Connor on 3 December 1987, Stephen Martin on 26 November 1984, Patricia Bailie on 29 September 1965, Emily Gallagher on 4 January 1978, Clare Hughes on 30 June 1975, Frances Bradley on 3 January 1967 and Geraldine Cunningham on 13 October 1963 and the claimant on 1 June 1962.
- (20) In relation to factual issue 22 the claimant has withdrawn her claim against the second respondent and it is unnecessary to determine this issue.

- (21) Factual issue 23 is no longer relevant as the claimant has withdrawn her claim of harassment against the second respondent.
- (22) A new legal secretary was employed subsequent to the claimant's dismissal but there was not any evidence of what duties and responsibilities that legal secretary discharged.
- (23) In terms of seeking other employment the claimant registered with employment agencies and the Jobs and Benefits Office. She also applied for a number of positions and had interviews.
- (24) The tribunal is satisfied that the claimant has made some efforts to mitigate her loss and did seek and is seeking other employment. The tribunal thinks she should have been able to obtain employment by 1 April 2017 as she has a wide range of legal skills and there appears to have been a reasonable number of legal secretary jobs for which the claimant could have applied.
- (25) The tribunal concludes that the appropriate uplift for the automatically unfair dismissal is 50% as the first respondent did not make any attempt to follow the statutory procedures. The tribunal does not consider that the concession of a 20% uplift, by the first respondent, would adequately reflect the circumstances of the failure to follow the statutory procedures in this claim.
- (26) The compensation to which the claimant is entitled is as follows:

Basic Award

£391.00 x 13.5 = £5,278.50

On departure from the first respondent she received - £5,098.85

The balance of the basic award = £ 179.65

Compensatory Award

1 September 2016-1 April 2017

£326.78 x 30.29 = £9,898.17

Notice pay received for 9 weeks = £3,371.94 = £ 6,526.23

Loss of pension contributions: £50.00 x 30 = £ 1,500.00

£ 8,026.23

Statutory uplift of 50% = £ 4,013.11

Total compensatory loss = £12,093.35

Loss of Statutory Rights £ 200.00

TOTAL COMPENSATION £12,239.35

7. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Employment Judge:

Date and place of hearing: 30 and 31 May, 1-2 June 2017, Belfast.

Date decision recorded in register and issued to parties: