

Appeal No. UKEAT/0208/13/LA

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 March 2014
Judgment handed down on 20 August 2014

Before

HIS HONOUR JUDGE BIRTLES

(SITTING ALONE)

COUNTRYWIDE ESTATE AGENTS & ORS

APPELLANTS

MR M G TURNER

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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SUMMARY

UNFAIR DISMISSAL - Compensation

CONTRACT OF EMPLOYMENT – Damages for breach of contract

Appeal as to 4 grounds relating to compensation awarded for constructive dismissal. Appeal dismissed on 3 grounds. Appeal allowed on Ground that the Employment Judge erred in awarding compensation based on earlier salaried position and not the salary of the position held by the employee at the EDT: **GAB Robins (UK) Ltd. v Triggs** [2008] ICR 829 at paragraph 34 per Rimer L J applied.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal by Countrywide Estate Agents from the remedies judgment and Reasons of Employment Judge Simpson, sitting at Southampton on 21 December 2012. The reserved judgment and Reasons was sent to the parties on 3 January 2013.

2. Employment Judge Simpson had previously found that Mr Turner was unfairly constructively dismissed by the Respondent at a hearing which took place on 8 and 9 October 2012. That Reserved Judgment and Reasons was sent to the parties on 25 October 2012. That Reserved Judgment and Reasons on liability are part of the appeal bundle.

3. The Appellant is represented by Mr Thomas Cordrey of counsel. The Respondent is represented by Mr Matthew Hodson of counsel. I am grateful to both counsel for their written and oral submissions.

4. I heard the appeal on 28 March 2014 and reserved Judgment.

The factual background

5. The Employment Judge summarised the facts in paragraph 5 of his Remedies Judgment.

He said this:

“5.1 The Claimant was recruited by the Respondent to the position of Area Manager which he commenced in May 2010. His initial remuneration was a basic annual salary of £33,000 plus guaranteed commission of £22,000 giving an effective annual salary of £55,000. At the time of joining the Respondent it was agreed that at the end of his probationary year he would be enrolled into the Respondent’s pension and healthcare schemes.

5.2 Between May and December 2010 he had responsibility for 6 offices later increased to 8. In January 2011 his remuneration package changed consensually to a basic salary of £35,000 plus monthly commission of 1% on all bankings, various monthly and quarterly bonuses and an annual bonus of 10% of profit.

5.3 In April 2011 an Area Manager left the Respondent’s employment and the Respondent’s Managing Director redistributed responsibility for managing its branches. The Claimant was

taken away from managing his original offices, some of which were in profit and would have produced a bonus for the Claimant and put in charge of 12 offices, all of which were loss making and known colloquially at the 'graveyard offices'. The Claimant resisted the change for various reasons not least of which was his perception that instead of receiving a bonus derived from his efforts in turning round that financial performance of his original offices the new office grouping would produce no bonus, which turned out to be correct.

5.4 The Claimant's fear and resistance were swept aside by the Respondent's Managing Director who gave the Claimant a promise he would not suffer financially but would receive 'substantially more' for taking on responsibility for this problem group of offices. This promise was never confirmed in writing and when the Claimant pressed for it the Managing Director told the Claimant not 'to challenge' him but to 'trust him' to keep his word and that he 'would not let [the Claimant] down'. The Claimant accepted those promises, acted on them to his detriment, and did not press for written confirmation as he, being an honourable and trusting man, expected the Managing Director to keep his word.

5.5 The Claimant acted as Area Manager of the new group for about 14 weeks until August by which time he had become demotivated and was concerned because the Managing Director had not implemented the agreed changes to his remuneration.

5.6 Towards the end of July the Claimant informed the Managing Director of his intention to leave the Respondent's employment as his new position was untenable. The Managing Director was anxious to retain the Claimant's services and persuaded him to remain in the Respondent's organisation as manager of 2 branches, leaving the door open to re-elevation to Area Manager at some time in the future. The Claimant accepted the offer and began working in his new position almost immediately. The new position attracted lower remuneration than his former position as Area Manager.

5.7 Within a short time a new situation arose in which the Claimant felt undermined and unsupported by the Managing Director as a result of which he terminated his employment by email dated 29th September. At the request of the Managing Director the Claimant agreed to extend his notice period by a month to manage one of the Respondent's offices which was experiencing difficulty. The effective date of termination was 30th November 2011.

5.8 At the liability hearing I found that the Claimant's resignation 'was caused by the cumulative effect of the various issues raised namely (1) the failure by [the Managing Director] to increase the Claimant's remuneration as promised; (2) his failure to implement the pension and healthcare benefits on completion of the probationary year as promised in May 2010; (3) his failure to support the Claimant in coping with the enlarged new group [of offices] and (4) his handling of the [final situation] undermining the Claimant's management [of that situation]. Although time elapsed since the remuneration issue was raised and not dealt with and the Claimant did not press resolution for fear of damaging further the relationship with [the Managing Director], it continued to fester with the Claimant and remained a live grievance requiring solution. The same applied to the pension and healthcare issues which were not abandoned by the Claimant but also needed resolving. When [the final issue erupted] the Claimant felt so undermined that when all actions were viewed cumulatively he concluded the fundamental trust and confidence in his manager was destroyed and was beyond redemption leading him to resign immediately.'"

The submissions before the Employment Judge

6. The Employment Judge then went on to summarise the arguments put before him. He said this:

"6. The Claimant submits that he should be compensated on the basis of the remuneration he would/should have received in his post as Area Manager and should not be limited to compensation based on the remuneration received from August onwards in his final position as branch manager. He contends the actions of the Managing Director should be seen as a continuing course of conduct leading to his resignation and prays in aid my finding that it was the cumulative effect of the 4 elements described above which together led to breach of the implied term of trust and confidence giving rise to his constructive dismissal. He could have resigned and treated himself as constructively dismissed at any of the above 4 stages. He

asserts that he should not be penalised for not resigning at the earliest opportunity and trying to make the employment relationship work.

7. The Respondent argues that the Claimant did not resign as a result directly of any of the first 3 issues referred to above and it was only the last issue, amounting to the ‘last straw’, which induced him to resign. It is submitted that he accepted the change in offices for which he had responsibility knowing that they were loss making as a result of which he would not receive bonus and in July, when he first attempted to resign, voluntarily accepted the variation in status from Area Manager to Branch Manager with consequent reduction in remuneration. It is contended that he is entitled to be compensated only for financial losses arising directly from the actions of his employer namely the 4th issue being the ‘final straw’ and calculation of his losses is restricted to the remuneration he was receiving at the time of his termination, namely as branch manager and earlier remuneration as Area Manager should be disregarded.

8. The Respondent also argues that there is no free standing contract claim under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Mr Cordery asserts that the agreed list of issues confirms this. The ET1 specifically includes a contract claim. Paragraph 29 asserts ‘(d) That the Respondents breached the contract that existed between the Claimant and the Respondents; and (e) That the Claimant is entitled to damages in respect of that breach.’

9. An agreed list of issues was handed in at the beginning of the liability hearing. It does not specifically refer to a free standing claim under the 1994 Extension Order but it does ask the question whether there was a fundamental breach of contract and if so ‘what remedy the Claimant is entitled to’.

10. It follows from my finding that the Claimant was constructively dismissed as a result of a fundamental breach of the implied term of trust and confidence going to the root of the contract of employment. I also found as facts that the Managing Director made promises, intended to be acted upon the Claimant’s employment contract, that the Claimant would benefit from the Respondent’s pension and healthcare schemes on completion of his probationary year and these terms were never implemented by the Respondent amounting to breach of an express term of the contract.

11. It was clear from the evidence and the way the case was run that the Claimant was seeking to enforce the express terms of his contract of employment, regarding remuneration, made with the Respondent, through its Managing Director.

12. On the above basis, I am satisfied there was no agreement that any claim under the 1994 Order was abandoned or not being pursued and I conclude there is no impediment to my awarding the Claimant damages for breach of contract pursuant to the 1994 Extension of Jurisdiction Order in addition to compensation for unfair dismissal under the Employment Rights Act 1996. The measure of damages in contract is to put the innocent party into the position he would have been had both parties to the contract performed their obligations according to the contract.”

The Employment Judge’s statement of the law

7. The Employment Judge then went on to set out the relevant statutory provisions in the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994** and section 123 of the **Employment Rights Act 1996**. He then considered the meaning of the phrase “just and equitable” in section 123 of the 1996 Act. He then said this:

“13. The relevant provisions of the Employment Tribunals Extension of Jurisdiction (England and Wales) order 1994 provide:

‘That proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –

- (a) The claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force and jurisdiction to hear and determine;
- (b) The claim is not one to which article 5 applies; and
- (c) The claim arises or is outstanding on the termination of the employee’s contract.’

14. Compensation for unfair dismissal is calculated according to different principles as set out in s.123 of the 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.’

15. I therefore conclude that if there were breaches of contractual terms of the Claimant’s contract of employment for quantifiable sums extant at the time the employment came to an end the Claimant is entitled to an award for damages to compensate for those breaches.

16. The Respondent seeks to limit the Claimant’s loss for unfair dismissal based upon his remuneration applicable at the time of the final act leading to his resignation.

17. Parliament used the word ‘just and equitable’ to describe the approach to be adopted when assessing compensation for unfair dismissal. I infer that Parliament intended what it said and that acting equitably is similar to but not precisely coextensive with acting justly. The definition [in] section 235 does not define either term. I apply the normal and usual interpretation to the word ‘just’ defined in the Oxford Reference Dictionary as ‘giving proper consideration to the claims of everyone concerned’ and involving ‘justness and fairness’.

18. Equity is a well-known concept in English law, developed over many centuries, as a way of modifying or ameliorating anomalies or hardships created by strict application of the common law. It has its own jurisdiction and a number of doctrines evolved in the course of time. They include the doctrines of ‘ex turpi causa non oritur actio’ i.e a party cannot benefit from his own unlawful actions, and a variant on the same theme, ‘he who comes to equity must come with clean hands’. In deciding what is ‘equitable’ in this case as distinct from what is ‘just’ I apply these doctrines to the extent they are relevant and take into account all the circumstances of the case.

19. In my judgement it would be neither just nor equitable to restrict the Claimant’s loss, in the circumstances of this case, calculated on his final salary. To do so would penalise the Claimant for not having resigned at the earliest opportunity and for making strenuous efforts to make his employment work. It would also be benefitting the Respondent for its unlawful acts breaching the express terms agreed with the Claimant over his remuneration.”

The Employment Judge’s conclusions

8. The Employment Judge said this:

“20. The Respondent is in breach of contract in a number of ways:

20.1 It failed to honour the contractual term made with the Claimant at the time he accepted employment, in May 2010, to admit the Claimant to its pension and healthcare schemes in May 2011, on completion of his probationary year.

20.2 It failed to honour the agreement made its Managing Director with the Claimant in April 2011 that his enforced move from his original group of offices to the ‘graveyard group’ would disadvantage him financially. Two promises were made, the first that he would not suffer financially as a result of the move and the second that he would receive a substantial pay rise to compensate him for the change and extra responsibility undertaken.

20.3 The Respondent breached the implied term of trust and confidence giving rise to the Claimant's unfair dismissal .

21. I approach the assessment of compensation for the Claimant in two ways. With regard to specific breaches of contract which can be quantified I award damages under the 1994 Order for all sums outstanding at the date of termination. With regard to all other matters flowing from constructive unfair dismissal I award compensation under s.123 of the Employment Rights Act 1996.

22. In my earlier liability judgment I found as facts:

22.1 On joining the Respondent in May 2010 the Claimant was informed he would join the Respondent's pension and healthcare schemes on completion of his probationary year. This was an express term of the contract.

22.2 In January 2011 the Claimant's remuneration package was varied to provide a basic salary of £35,000 plus a monthly commission of 1% on all bankings, other monthly and quarterly bonuses and an annual bonus of 10%.

22.3 In April 2011, when moving the Claimant, against his wishes, to take responsibility for the 'graveyard offices' the Respondent promised the Claimant would not suffer financially and would receive a substantial increase in remuneration. I also found that the Claimant expected these changes to be recorded in writing, leading him to press the Managing Director to do so on more than one occasion, but did not pursue it when relations became difficult, instead relying on the Managing Director's word.

22.4 In assessing the s.123 damages they have to reflect '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' and in reaching a conclusion I have to have regard to 'all the circumstances'.

22.5 Mr Cordrey argues that loss sustained by the Claimant 'in consequence of the dismissal....attributable to action taken by the' Respondent means the Claimant can recover only on the basis of the position which existed at the time of the termination. He asserts it was the final event when the Managing Director failed to support the Claimant, being the 'last straw', which should be regarded as the action taken by the employer from which compensation flows. He argues that had it not been for this 'final straw' the Claimant would have remained employed by the Respondent and no issue of dismissal, fair or otherwise, would have arisen.

22.6 The Claimant argues that a broader approach should be taken and the Respondent's conduct should be viewed holistically. He contends that the enforced move to the 'graveyard offices' was a breach of contract entitling him to resign and he would have done so had it not been agreed by the Managing Director that he would not lose financially. He also contends that the Respondent's failure to implement the agreement for him to join the Respondent's pension and healthcare schemes in May 2011 was also a fundamental breach of contract entitling him to resign. He further contends that imposing on him responsibility for 4 extra offices, against his will, making his job unmanageable, was a breach entitling him to resign and it was the cumulative effect of these breaches brought to a head by the final event of failing to support him that caused the Claimant to resign.

22.7 In my judgement, the Claimant should not be penalised for trying to make his employment work and for not departing at the earliest opportunity. In considering 'all the circumstances' I take into account the economic climate existing nationally in 2011. In a time of plenty, when the employment market is buoyant, and estate agents were seeking managers the Claimant may well have departed earlier. That was not the case in mid-2011. The Claimant is a family man then aged 47 and as proved to be the case alternative employment was not easy to find. When the Claimant took the post of Senior Branch Manager responsible for 2 offices he did so to avoid continuing in a post which he felt was too onerous for any one manager and the Managing Director held out the 'carrot' that the Claimant might return to area management in the future. The Claimant did not take the Senior Branch Manager's position out of choice as it was clear from the evidence that he preferred to remain in his original area management position and resisted his forced move to the 'graveyard offices'. It would therefore not be 'just' to compensate him on the basis of his final position as he was effectively forced into that position by the actions of the Respondent.

22.8 It would also not be 'equitable' to do so as it would allow the Respondent to benefit from its own unlawful acts.

22.9 In calculating damages for breach of contract and compensation for unfair dismissal I adopt the figures in the Claimant's schedule of loss which were not challenged by the Respondent.

23. The Claimant was aged 47 at the effective date of termination having been born on 3rd July 1964. He commenced employment with the Respondent on 18th May 2010 and the effective date of termination was 30th November 2011. He has continuous employment of more than 1 year but less than 2.

24. His remuneration at the time of the enforced move to the 'graveyard offices' in April 2011 was:

Gross annual salary £35,00

Net monthly salary £2,194

Average net monthly commission £995

25. I calculate his net monthly remuneration to include salary and commission to be £2,194 and £995 = £3,189. On this basis his average net weekly pay was £735. The Claimant was entitled to 4 quarterly bonuses each of £500 and an annual bonus of £16,200.

26. There are no exact figures for the benefits the Claimant would have received when he entered the Respondent's pension and healthcare schemes in May 2011 but I accept the Claimant evidence in estimating the amount at £5,408 annually.

27. The Claimant obtained fresh employment in April 2012 and for the period until December 2012 received total net salary and commission of £24,000. He estimates his net pay for the 12 month period from January to December 2013 will be £35,733 or £2,978 monthly."

9. The Employment Judge then went on to consider damages for breach of contract. He said this:

"Damages for Breach of Contract

28. For the period for May to November 2011 (7 months) the Respondent was obligated to pay the Claimant remuneration not less than he was contractually entitled to when Area Manager of his original group of offices. There was an agreement he would receive a substantial pay rise but there is no evidence of what was envisaged and it is too speculative for me to reach any conclusion as to the figure as a result of which I disregard any such increase.

29. The following monies were contractually owing to the Claimant at the termination of his employment with the Respondent and I award him damages in the following sums:

	£
7/12 th annual bonus of £16,200	9,450
Quarterly bonuses for 2 quarters	1,000
Lost commission	1,745
Pension and healthcare contributions	3,154
Reduction in basic salary	1,666+
Total	17,015"

10. The Employment Judge then considered compensation for unfair dismissal. He said this:

“Unfair Dismissal Compensation

30. The Claimant was unemployed for the period from the 30th November 2011 until the beginning of April 2012. He made strenuous efforts to find new employment and the Respondent does not assert he failed to mitigate his loss.

31. For this period of 4 months the Claimant would have earned net salary and commission of £3,189 per month amounting to a loss of $4 \times £3,189 = £12,756$. He would also have received 4/12 annual bonus of £16,200 = £5,400; 4/6 of 2 quarterly bonuses each of £500 being $4/6 \times £1,000 = £666$; commission for 4 months $4/6 \times £1,745 = £1,163$; and pension and healthcare contributions $4/12 \times £5,408 = £1,802$. His losses for this period are therefore £21,787.

32. The Claimant asserts that from April 2012 he suffered a continuing loss as his remuneration from his new employment is below that which he would have received from the Respondent and claims future loss for a period of 24 months. His total net pay and commission in his new employment for the period April to December 2012 is £24,000 comprising net pay of £16,000 and commission of £8,000. Had the Claimant remained employed by the Respondent he would have received monthly net salary + commission of £3,189 + £1,350 annual bonus + £83 quarterly bonus + pension and healthcare contributions of £451 making a monthly total of £5,073. For a similar 9 month period he would have received from the Respondent $9 \times £5,073 = £45,657$ producing a loss for the period of £21,657.

33. The Claimant’s pay structure in his new employment changes with effect from January 2013 after which he expects to receive annual net pay of £22,933 and net commission of £12,800 making a total of £35,733. In his employment with the Respondent he would have received net emoluments of $12 \times £5,073 = £60,876$ producing an annual loss of £25,143 being the equivalent of £2,095 monthly.

34. There is no evidence showing that after a certain date the Claimant will earn at the same level in his new employment as he did with the Respondent. Doing the best I can, and taking into account uncertainties like the state of the property market, which influences commission, and in the present economic climate, security of employment, I conclude future losses should be capped at 12 months from the date the new employment commenced which will amount to another 3 months from the end of December 2012. Based on the above calculation, I calculate his future loss for the next 3 months to be $3 \times £2,095 = £6,285$.

35. The Claimant is also entitled to a Basic Award of £645 ($1.5 \times £340$).”

11. Finally, the Employment Judge awarded a sum of £860 for loss of statutory rights:

“I assess his loss of statutory rights at 2 weeks gross salary capped by the statutory maximum = $2 \times £430 = £860$.”

The grounds of appeal

12. There are four grounds of appeal. I take each in turn.

Ground 1: The Tribunal had no jurisdiction to make an award of damages for breach of contract and/or it was an error of law and perverse to make such an award because the Claimants did not raise or pursue such a claim.

13. Mr Cordrey submits that the Employment Judge was in error in making an award of £17,015 for breach of contract, which the Tribunal did not have jurisdiction to make. He relies on the following matters:

- (i) No breach of contract claim was pleaded in the ET1: appeal bundle page 42;
- (ii) No breach of contract claim was referred to in the ET3: appeal bundle page 51;
- (iii) The Claimant's skeleton argument, submitted prior to the liability hearing stated that unfair dismissal was the sole issue in the case: appeal bundle page 73 at paragraph 5 and 78 at paragraph 17;
- (iv) The agreed list of issues, adopted by the Judge at the start of the liability hearing, listed unfair dismissal as the only issue in the case: appeal bundle page 71;
- (v) Neither party referred to a discrete breach of contract claim in the evidence or submissions at the liability hearing;
- (vi) The liability judgment listed unfair dismissal as the sole issue in the case: appeal bundle page 16 paragraph 1 and solely determined the case of unfair dismissal: appeal bundle page 26 at paragraphs 21-22;
- (vii) A remedy was awarded in the remedy judgment in respect of five purported breaches of contract, namely:
 - (a) an annual bonus;
 - (b) quarterly bonuses;
 - (c) commission;
 - (d) pension and healthcare contributions; and
 - (e) basic salary: Appeal Bundle page 9 paragraph 29.

The Employment Judge made no finding of liability in the liability judgment in respect of any of those five breaches of contract.

(viii) The five purported breaches of contract set out above were not relied upon in relation to the unfair dismissal claim as alleged breaches of contract which entitled the Claimant to resign. In relation to the unfair constructive dismissal claim only two breaches of contract were before the Tribunal:

(a) breach of an oral agreement to “increase the Claimant’s remuneration”;

(b) breach of the implied term of trust and confidence: appeal bundle pages 17 at paragraphs 6 and 26 at paragraph 20.

Mr Cordrey gave examples in his written and oral submissions of how this prejudiced the employer’s presentation of the case about the unfair dismissal: see e.g paragraphs 12-13 of his skeleton argument.

14. By contrast, Mr Hodson makes two submissions. First, for the reasons given in the Respondent’s EAT Answer, he submits that, as a matter of fact, the Claimant did make a claim for breach of contract as well as unfair dismissal and the assertions put forward by Mr Cordrey are incorrect. In the alternative, he relies upon the decision of the EAT in **Symonds (t/a Symonds Solicitors) v Redmond-Ord** [2014] 1 ICR D6.

15. I have carefully considered the alternative submissions made by counsel. My conclusion is that, for the reasons set out in the Respondent’s EAT Answer, the issue of breach of contract was squarely in front of the Employment Judge at the remedies hearing and was properly pleaded in the ET1: see, in particular, paragraphs 16-17, 27 and 29(d) and (e). I also accept the other submissions made by Mr Hodson in that respect.

16. Turning to the decision of HHJ David Richardson in the **Symonds case**, it seems to me there is a simple distinction between that case and the present case. It is that no claim for breach of contract was pleaded in the **Symonds case**: see the judgment at paragraph 9. There was no claim for “other claims”. That was not this case: see the ET1, paragraph 5(e). The other paragraphs of the ET1 I have just referred to. In my judgment the issue of compensation for breach of contract was clearly in front of the Employment Judge both at the liability hearing and the remedies hearing.

Ground 2: The Employment Judge erred in law by basing the compensatory award on the Claimant’s income in the Area Manager post (which he had left 4½ months prior to the EDT) rather than basing it on his contractual income at the time of dismissal.

17. Mr Cordrey submits that under the **Employment Rights Act 1996**, section 123, the Employment Tribunal should only award what it:

“...considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer”.

18. He particularly relies on the words “in consequence of the dismissal”. He goes on to submit that, on the facts of this case, the Employment Judge erred in law in awarding what he considered was “just and equitable” without due regard to whether any loss was sustained “in consequence of the dismissal”. He refers to the Employment Judge’s reasoning at paragraphs 17-19 of the remedy Reasons.

19. Mr Cordrey makes two main submissions. The first is that at the date of the constructive dismissal on 30 November 2011 the Claimant was employed as a Senior Branch Manager. He had accepted that position of his own free will. It was a more junior position than his previous

posts of Area Manager for Region 2 (R2) and before that of Area Manager for Region 1 (R1). At the date of his constructive dismissal he was therefore on a lower salary, yet the Employment Judge, applying section 123(1) of the 1996 Act, based his calculation of the compensatory award not on the Senior Branch Manager emoluments but on the emoluments of the Area Manager R1. In other words Mr Cordrey submits that the Employment Judge overcompensated the Claimant because the loss of the Claimant's Area Manager R1 pay did not flow from the dismissal. The last straw did not occur until after he had become a Senior Branch Manager. In the alternative Mr Cordrey submits that the specific loss of the Claimant's Area Manager R1 pay flowed not from the unfair dismissal but from the Claimant's move from Area R1 to Area R2, which was a less well performing area with a resulting drop in his income. That move was agreed to by the Claimant. Therefore any breach of contract was waived. The Claimant continued to work and was therefore estopped from making that argument by his representation: EAT Bundle page 74 paragraph 6 (Claimant's skeleton argument at Employment Tribunal drafted by Mr Hodson).

20. Mr Hodson submits that the Employment Judge was correct and relied upon paragraphs 16-22 of the remedy judgment. In the alternative he relies upon the judgment of HHJ Peter Clark in **Toni and Guys (St Pauls) Ltd v Mrs M Giorgiou** (UKEAT/0085/13//DM 19 July 2013).

21. In my judgment the short answer to this ground of appeal is to be found in the judgment of Rimer LJ in **GAB Robins (UK) Ltd v Triggs** [2008] ICR 829 at paragraph 34, cited by HHJ Richardson in the **Symonds case**, supra, at paragraph 29. I respectfully agree with Judge Richardson that that is the correct approach. In this case, to paraphrase the words of Rimer LJ

in the **Triggs** case, the Claimant's dismissal was effected purely and simply by his decision on 29 September 2011. The period of notice was extended by agreement to 30 November 2011.

22. As far as Mr Hodson's submission based on the **Toni and Guys (St Paul's) Ltd case** is concerned, I am unable to find that what Judge Clark said in paragraph 13 of his judgment has any relevance to the present case. The capricious diverting away from the claimant of work on which she would have earned additional compensation as a hairdresser seems to be quite different from the situation where the Claimant has freely accepted a new contractual position.

Ground 3: In the alternative to ground 1, if it found that the Tribunal did have jurisdiction to consider a discrete breach of contract claim, it was an error of law/perverse to award damages

23. Mr Cordrey submits that the Employment Judge failed to undertake any careful or rigorous analysis of the breach of contract claim. In relation to the five breaches (see paragraph 9 of his skeleton argument) the Employment Judge failed to set out what contract had been breached, what the exact term was, whether the term was written or oral, express or implied or whether the exercise of any contractual discretion was in accordance with the law. He also submits that all of the breaches were found were based on a false premise set out in paragraph 28 of the Reasons. There is no express or implied term in the contract of employment that during May-November 2011, when the Claimant was Area Manager of Region 2 and then a Senior Branch Manager, he would nevertheless be remunerated as though he was Manager of Region 1. See also paragraphs 21-22 of the grounds of appeal.

24. I agree with Mr Hodson that ground 3 falls away if ground 1 is dismissed. I have dismissed it. It is a matter for each party to decide what evidence it places before the

Employment Judge. It is clear from paragraph 2 of the remedy Reasons that the Claimant produced a supplementary witness statement but was not cross-examined. He produced an up-to-date Schedule of Loss. The employer did not call evidence before the remedies hearing. It was open to it to do so.

25. In my judgment the reasoning of the Employment Judge, both as to the breach of contract and the assessment of compensation, amounts to neither an error of law nor to perversity. The Employment Judge had to deal with the matter based upon the evidence he had heard both at the liability hearing and the remedies hearing. He did so.

Ground 4: The Tribunal's decision to award £860 for loss of statutory rights was an error of law/perverse.

26. Mr Cordrey submits that the award was made without any reasoning despite the fact that the Claimant had just one year's continuous service at the time of dismissal and by the time of the Remedy Hearing he had secured stable full-time employment.

27. I agree with Mr Hodson that the Employment Judge made the award to compensate the Claimant for the fact that he no longer had any protection for unfair dismissal for the first two years of any new employment. The award of two weeks' gross pay capped at the statutory maximum is entirely within the discretion of the Employment Judge and cannot be described as perverse. The decision of Lady Smith in **Superdrug Stores plc v Ms J Corbett** (UKEATS/0013/06/MT 12 September 2006) is distinguishable on the basis that in that case the Employment Tribunal made an award at what was then ten times the basic net salary. That is a long way from two weeks gross pay.

Conclusion

28. It follows from my reasoning above that the appeal is allowed on ground 2 and grounds 1, 3-4 are dismissed. Unless the parties are able to agree a proper calculation of the compensation now to be paid to Mr Turner the matter will have to be remitted to the same Employment Judge for consideration in the light of this judgment.